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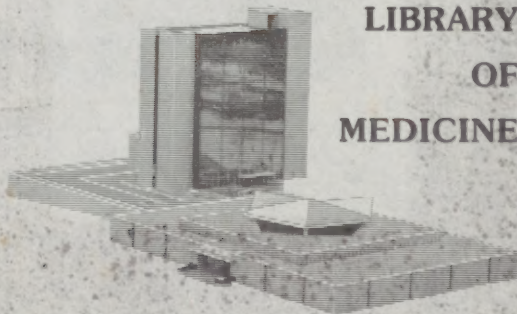
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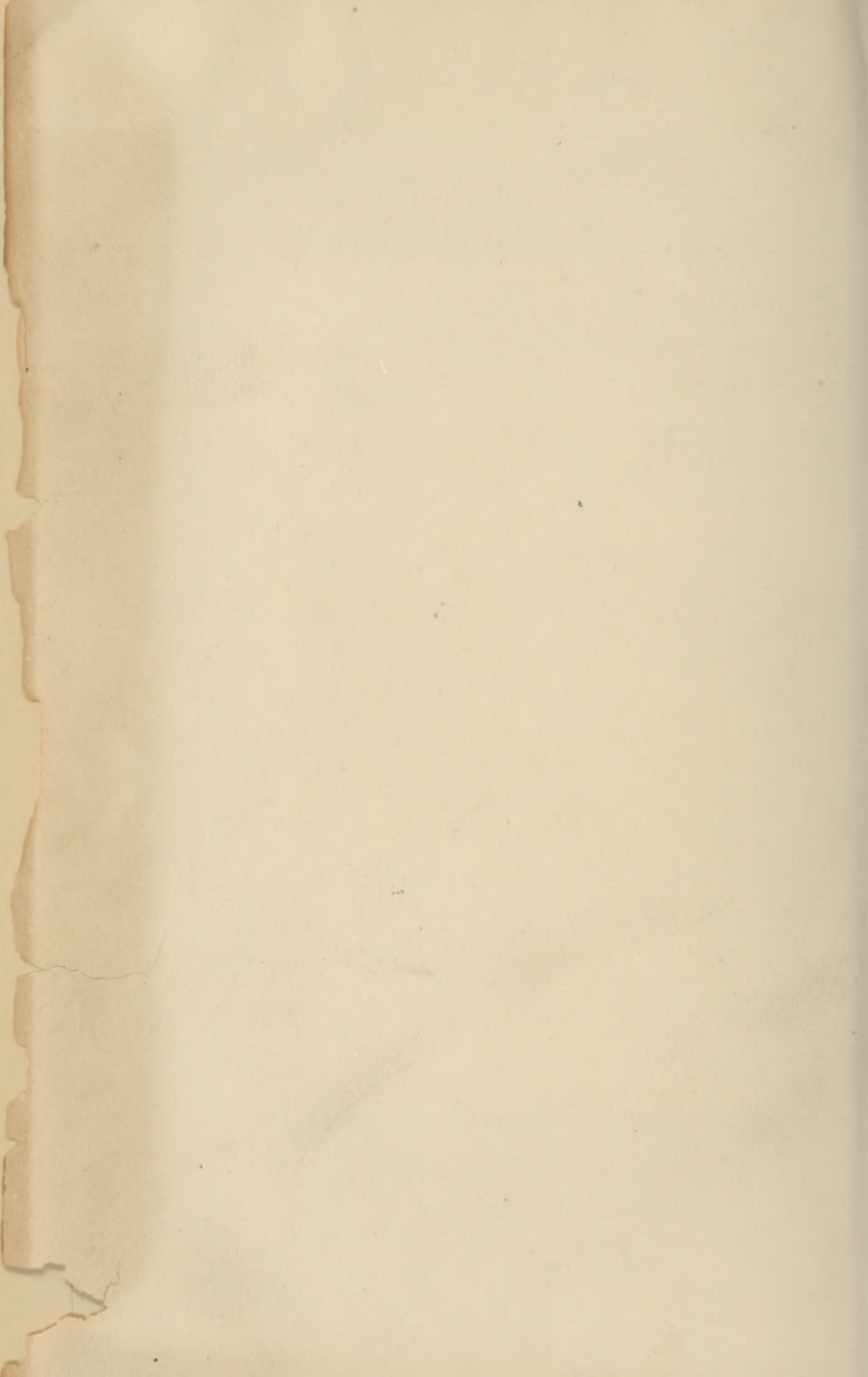
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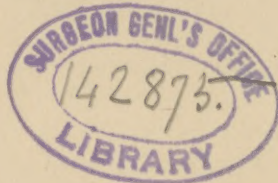
A TREATISE

ON THE LAWS REGULATING THE MANUFACTURE
AND SALE OF

INTOXICATING LIQUORS

By HENRY CAMPBELL BLACK, M. A.

Author of "BLACK'S LAW DICTIONARY" and of treatises on "JUDGMENTS," "TAX
TITLES," "CONSTITUTIONAL PROHIBITIONS," Etc.



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PREFACE.

It is a striking and significant fact that of all the reported cases, civil and criminal, arising under the laws regulating the manufacture and sale of intoxicating liquors, a very large proportion have been decided within a recent period. Of the whole number of authorities cited in the following pages, fully one-half have been ruled within the last decade, and probably one-third within the last five years. Now the rate of growth and development of the case-law on any given branch of the law, at least when it is as rapid and widespread as in the instance of the present subject, is a reliable indication of its increasing interest and importance. And this phenomenon cannot be fully accounted for, in the present case, by the intervention of any local or temporary causes. It points unmistakably to a general and growing determination to secure the enactment of effective measures for the suppression, as far as possible, of the evils of intemperance, and then to see to their full enforcement. Hence it is a safe prophecy that the number of actions, on both the civil and criminal side, founded on the laws in question, will not in the near future diminish. Again, the subject has passed beyond the point where its case-law might be described as rudimentary. In fact, the extant authorities have carried both the principles of interpretation and the rules of application to particular states of fact into such a degree of detail that the mass of precedents appears to exhibit a confusing and hopeless disorder, until marshalled in accordance with a rational plan of classification and treated as the authoritative expositions of a complex but consistent system of principles. For these reasons, the author has judged his present subject to be timely. And as there is no other general text-book on this branch of the law, he is emboldened to hope that his labors may not prove unprofitable to the profession.

From various points of view the subject is of interest to the student of jurisprudence and statecraft, but from none more so than in relation to the constitutional discussions which the laws of this character have occasioned. Every system of liquor legislation, every statute on the subject, has been fiercely assailed and subjected to the test of objection on every conceivable ground of unconstitutionality,—in some cases with most obvious inappropriateness, in others, with great plausibility, in some

few, with success. The rights of persons and property, the relative sphere of the federal and state governments, the various limitations upon legislative authority, have all been canvassed in detail in the proceedings instituted under these laws; insomuch that a summary of the decisions would almost amount to a commentary on American constitutional jurisprudence. Nor has this interest been confined to the constitutional theorist or the political philosopher. To show this, we have only to mention the recent decision of the United States supreme court in *Leisy v. Hardin*, the "Original Package" case. Aside from its important tendency in the direction of settling more clearly the boundaries of federal and state power under the commerce clause of the constitution, we may venture to say that very few, if any, of the decisions promulgated by that eminent tribunal have exercised a more immediate, more important, or more general influence upon the practical affairs and interests of the people.

It is of course familiar to every one that different states have now in force very different systems of liquor legislation. And the author was at first inclined to fear that this statutory diversity would prove a serious obstacle to a general and systematic treatment of the subject. But as his investigations proceeded, he found that the various statutes could readily be grouped under a few types, and that while these were not always divided by a broad line of distinction, yet the laws considered as referable to the same type were so far similar that there was no insurmountable difficulty in arranging and using the body of authorities. The system of prohibition, for example, is nearly the same, in its general features, in all the states where it prevails, and indeed in many of its details. And the same is true of the system of local option, of licensing, and of the civil damage laws. While, therefore, the reader will perceive the necessity of closely observing the enacted law of his own jurisdiction, he will also find that this treatise is not local in its character, but is adapted for use in all the American states. And it may be added that, in several departments of the subject, and particularly in relation to the pleading, evidence, and practice in liquor cases, the law is practically untouched by statute, depending almost wholly upon common-law principles.

One further remark must be made in this connection. This book is not a plea for any particular system of liquor legislation. It is purely and solely a legal treatise. The law-writer has no more to do with the wisdom, justice, or expediency of the statutes whose legal effect he discusses than has the court which is called upon to administer them. If a study of the various reported cases under any given system may serve, statistically or otherwise, to suggest inferences as to its practical work-

ings, the present writer is responsible for no more than his fair and unprejudiced statement of the cases and the *legal* conclusions to which they lead him. At the same time, no man can be blind to the great public necessity, under present conditions, of having a sound and wise policy of legislation on the subject of the liquor traffic. And that the laws, whether or not they are the best that could be devised, should be surely and effectively administered is a matter of equally obvious and urgent importance. In view of this, the author has addressed himself to the solution of such disputed questions of law as he has encountered in the course of this work, with earnestness and candor, with as much reason and judgment as he found himself capable of, but also with a single view to their determination in accordance with legal—not moral or sentimental—principles.

In regard to the plan of construction of the work, the author has not departed from the theories which have characterized his former contributions to legal literature, and which, in his judgment, must serve to account for the very gratifying degree of favor with which those efforts have been received by his professional brethren. His constant aim has been to make a thoroughly practical treatise—a useful tool for the working lawyer. And to this end, he has endeavored to secure an orderly and scientific arrangement of his subject, a clear and concise statement of its rules and principles, and an abundant but judicious citation of authorities. No pains have been spared, in the way of section-headings, index, and other such helps, to make the contents of the book easily and quickly accessible at any point. And for a similar reason, parallel references have been given, in the case of all decisions concurrently reported, to the various periodicals composing the National Reporter System, as also to the series of American Decisions and American Reports. The citations have been brought down to the present date.

Finally, although no branch of the subject has been unduly enlarged upon at the expense of the others, particular attention has been given to matters connected with criminal prosecutions under the liquor laws, to the doctrines of criminal responsibility and the constituent elements of the various statutory offenses, and to the rules applicable to the framing of indictments and the admissibility and sufficiency of evidence, as well in general as in relation to the specific crimes. It is thus hoped that those who may be called upon to prosecute or defend actions of this character will find the work specially serviceable to them in the office and the court-room.

H. C. B.

WASHINGTON, D. C., April 1, 1892.

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THE LAW OF INTOXICATING LIQUORS.

CHAPTER I.

DEFINITIONS AND CONSTRUCTION OF TERMS.

- § 1. Terms used in Statutes.
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§ 1. Terms used in Statutes.

The statutes enacted in the various states, for the regulation of the manufacture and sale of intoxicants, have employed a variety of terms as designations of the species of beverages against which their provisions are directed. In some instances, the laws are explicit in naming the liquors intended. But for the most part, legislatures have

been content to use general expressions, leaving it for courts and juries to determine whether particular fluids came within the language of the act. Such general terms are "intoxicating liquors," "intoxicating beverages," "spirituous liquors," "ardent spirits," "strong liquors," "distilled," "vinous," "fermented," or "malt" liquors. As it is essential that the meaning of these terms should be clearly understood, in all our subsequent discussions, we shall proceed to consider their significance in the light of the adjudged cases and other authorities, and to state the decisions in regard to certain of the well known varieties of liquor, with reference to their inclusion in one or other of these terms and to the province of the courts in taking judicial notice of their nature and properties. This, together with a consideration of the meaning of some other terms,—such as "tavern," "tippling-house," "saloon," etc.,—will constitute the matter of the present chapter.

§ 2. Intoxicating Liquors.

The meaning of this term is in some instances prescribed in the statute itself. And when that is the case, there is no room for further inquiry into its scope, nor are the courts called upon to construe it.¹ Neither, in the face of a statutory definition, is it permissible to examine into the actual intoxicating properties of any liquor named or indicated in the law. Thus, if the law provides that the term "shall be construed to mean alcohol, wine, beer, spirituous, vinous, and malt liquors, and all intoxicating liquors whatever," a beverage containing alcohol is an intoxicant, regardless of whether the quantity of alcohol contained in it is or is not, of itself, intoxicating.² But if the general expression is used, without more, it may be defined as meaning any liquor, intended for use as a beverage or capable of being so used, which contains alcohol, either obtained by fermentation or by the additional process of distillation, in such a proportion that it will produce intoxication when taken in such quantities as may practically be drunk.³ And

¹ State v. Wittmar, 12 Mo. 407.

³ Intoxicating Liquor Cases, 25 Kans.

² State v. Intoxicating Liquors, 76 Iowa, 243, 41 N. W. Rep. 6. 767, 37 Am. Rep. 284; Comm'rs v. Taylor, 21 N. Y. 173; People v. Hawley, 3

here it must be noted that the two terms, "intoxicating liquor" and "spirituous liquor," are not synonymous or convertible.⁴ The former is much wider than the latter. All spirituous liquor is intoxicating, but not all intoxicating liquor is spirituous. In correct use, the last named term is confined to distilled liquor; but there are various kinds of intoxicating liquor which are not the product of the still. Either spirituous, vinous, or malt liquor may be intoxicating, yet neither of these classes, nor all of them combined, include all that is meant by intoxicating liquors or beverages.⁵ Hence, for example, a statute entitled "an act to prohibit the sale of spirituous liquors," which declares that it shall be unlawful for any person to sell intoxicating liquors, contains matter different from that expressed in its title.⁶ Practically, the character of a given liquor, as intoxicating or not, must depend upon the quantity of alcohol which it contains. But no attempt to fix the necessary proportion of this ingredient has met with universal acceptance. In one of the cases it was suggested that this character should not be ascribed to those beverages "containing so small a percentage of alcohol that the human stomach cannot contain sufficient of the liquor to produce that effect."⁷ In cases where the proportion of alcohol is large, there is no difficulty in reaching a correct conclusion.⁸ But otherwise the question must in general be left to the determination of the jury, upon the evidence of persons acquainted with the liquor in controversy or who have observed the effects of its use.

§ 3. Spirituous Liquors.

There are a few decisions in which the courts have given a wider scope to this term than that indicated in the preceding section. Thus, in North Carolina, it has been held that the phrase "spirit-

Mich. 330; *Foster v. State*, 36 Ark. 258; *Bishop, Stat. Crimes*, § 1007.

⁴*Comm. v. Grey*, 2 Gray, 501, 61 Am. Dec. 476; *Comm. v. Livermore*, 4 Gray, 18; *Clifford v. State*, 29 Wis. 327; *McDuffie v. State*, (Ga.) 13 S. E. Rep. 596; *Allred v. State*, 89 Ala. 112, 8 South. Rep. 56.

⁵*Allred v. State*, 89 Ala. 112, 8 South. Rep. 56.

⁶*McDuffie v. State*, (Ga.) 13 S. E. Rep. 596.

⁷*Comm'r's of Excise v. Taylor*, 21 N. Y. 173.

⁸For example, an allegation of the sale of intoxicating liquors is sustained by proof of sales of "sun-smile," an article containing fifteen per cent. of alcohol, and capable of producing intox-

nous liquors," as used in the statutes, includes fermented liquors, such as wine and beer, as well as distilled liquors.⁹ And there was also a similar ruling once made in Tennessee.¹⁰ This, however, was in a case where the statute simply prohibited the sale of "spirituous liquors" on Sunday, and the court felt constrained to construe the phrase liberally in order to prevent evasions and subterfuges. And even with this reason for its doctrine the case referred to was overruled in a later decision, wherein it was held that the term in question included only distilled liquors, and not wine, ale, or beer.¹¹ This last interpretation—which is certainly consonant both with reason and the right use of language—is the one which all the courts are now agreed upon,¹² with the exception of the case cited from North Carolina. Of course, however, the statute itself may direct that a wider signification be given to this term than its ordinary use warrants. Such is the case in New Hampshire, where it is provided that the phrase "spirituous liquors" shall include "all spirituous or intoxicating liquor, and all mixed liquor any part of which is spirituous or intoxicating." Under this enactment, the courts hold that intoxicating wines are included within the prohibition of the statute.¹³ It is also to be

ication. *Prussia v. Guenther*, 16 Abb. New Cas. 230.

⁹ *State v. Giersch*, 98 N. Car. 720, 4 S. E. Rep. 193. In this case, Merrimon, J., observes: "'Spirituous' means containing, partaking of, spirit; having the refined, strong, ardent quality of alcohol in greater or less degree. Hence 'spirituous liquors' imply such liquors as above defined,—as contain alcohol and thus have spirit,—no matter by what particular name denominated, or in what liquid form or combination they may appear. Hence, also, distilled liquors, fermented liquors, and vinous liquors are all alike spirituous liquors. These liquors, respectively, may have different degrees of spirit in point of fineness and strength. Distilled liquors may be stronger or weaker according to the quantity and quality of the alcohol in them, and so of the other kinds mentioned. We know from general obser-

vation and knowledge, and it is a generally admitted physical fact, not denied in this case, that lager beer and wine contain alcohol, and, generally, in such quantity and degree as to produce intoxication. These liquors therefore are spirituous, and obviously come within the meaning and are embraced by the words 'spirituous liquors' as used in the statute, unless there is something in the latter which shows that these words were intended to have a more limited application."

¹⁰ *State v. Sharrer*, 2 Cold. 323.

¹¹ *Fritz v. State*, 1 Baxt. 15.

¹² *Comm. v. Grey*, 2 Gray, 501, 61 Am. Dec. 476; *Comm. v. Livermore*, 4 Gray, 18; *Clifford v. State*, 29 Wis. 327; *State v. Moore*, 5 Blackf. 118; *Comm. v. Jordan*, 18 Pick. 228; *State v. Thompson*, 20 W. Va. 674. See *Atty. Gen. v. Bailey*, 1 Exch. 281.

¹³ *Jones v. Surprise*, 64 N. H. 243, 9

noted that the restricted meaning of the term cannot be relied upon as a cloak for crafty evasions of the law. Thus, the offense of unlawfully selling "spirituous liquor" may be committed by a sale of such liquor mixed in small quantities with other unknown ingredients, and called for and sold as "beer."¹⁴ An indictment for the unlawful sale of spirituous liquors is not bad for using the word "spiritual" or "spiritous," instead of the correct term.¹⁵

§ 4. Distilled Liquors.

This phrase, though of rarer occurrence in the statutes than those we have already defined, is sometimes used in connection with the terms "vinous" and "malt" liquors. It includes only such liquors as are obtained by the process of distillation, *e. g.*, whisky, brandy, rum, gin, maraschino, etc., and is never applied to wine, beer, ale, or other fermented or malt liquors. Under the internal revenue laws of the United States the term embraces all spirits produced by distillation, whether they are rectified or not.¹⁶

§ 5. Wine, or Vinous Liquors.

As we have seen in a preceding section, wine is not properly included in the term "spirituous liquor," that designation being applicable, when language is correctly used, only to such beverages as are produced by distillation, and not to fermented liquors.¹⁷ In ordinary parlance, and within the meaning of the statutes on the subject, the phrase "vinous liquor" denotes such liquor as is made from the fermented juice of the grape.¹⁸ But since the term "wine" is

Atl. Rep. 384, construing Gen. Laws N. H. c. 109, §§ 3, 13, 18.

¹⁴ Comm. v. Bathrick, 6 Cush. 247.

¹⁵ State v. Clark, 3 Ind. 451; Comm. v. Burke, 15 Gray, 408.

¹⁶ U. S. Rev. St. §§ 3248, 3289, 3299; U. S. v. Anthony, 14 Blatchf. 92.

¹⁷ State v. Moore, 5 Blackf. 118; Caswell v. State, 2 Humph. 402. See State

v. Stewart, 31 Me. 515. Compare State v. Giersch, 98 N. Car. 720, 4 S. E. Rep. 193; Jones v. Surprise, 64 N. H. 243, 9 Atl. Rep. 384.

¹⁸ *Supra*, § 3; Adler v. State, 55 Ala. 16; Worley v. Spurgeon, 38 Iowa, 467; Allred v. State, 89 Ala. 112, 8 South. Rep. 56.

also used, in a secondary sense, of certain fluids extracted from berries and from other fruits than the grape, it is pertinent to inquire whether these also should be understood as included in the statutory designation of vinous liquors. There is some authority for holding that they are not so included. Thus, in regard to the word "vinous," it is said: "Without endeavoring to trace it any further back, we may say that it is derived from the Latin *vinum*, wine, and so named because made from the fruit of the vine. Wine is defined in Worcester's dictionary, after the statement of its derivation, and after reference to the word in the language of many nations, as meaning, first, the fermented juice of the grape; second, the fermented juice of certain fruits resembling in many respects the wine obtained from grapes, but distinguished therefrom by naming the source whence it is derived, as ginger-wine, gooseberry-wine, currant-wine, etc. Nothing is said about apple-wine or pear-wine, unless they are included in the 'etc.' . . . If the statute might include among the 'vinous' fluids those which come from the juice of fruits which grow on vines and bushes, and are named wine, we do not think it should be construed so liberally as to apply the term 'vinous' to the juice of fruits which grow on trees."¹⁹ That wine is intoxicating is a familiar fact. And hence it would seem too plain for argument that it is included in the term "intoxicating liquors" as used in the statutes. Yet the courts have shown considerable hesitation in so holding. In Maine, it seems to be the doctrine that the question must be left to the jury.²⁰ In Pennsylvania, under an act prohibiting the sale of "vinous liquors" within a certain district, it is ruled that an offense is committed by the sale of domestic wine, which need not be shown to be intoxicating.²¹ In one of the earlier Indiana decisions, the court declared that it did not know judicially that wine was *not* intoxicating, and that it would not question the power of the legislature to declare it to be so.²² But in North Carolina, it is fairly held that on proof of a sale of port wine, the fact of its intoxicating quality is a matter of common knowledge, and can be passed on by the jury

¹⁹ Feldman v. Morrison, 1 Ill. App. 460.

²⁰ State v. Page, 66 Me. 418.

²¹ Hatfield v. Comm., 120 Pa. St. 395, 14 Atl. Rep. 151.

²² Jackson v. State, 19 Ind. 312.

without evidence,²³—a decision which will certainly commend itself as in accordance with both law and reason.

§ 6. Malt Liquors.

This term, it is said, “embraces porter, ale, beer, and the like, which are the result or product of a process by which grain, usually barley, is steeped in water to the point of germination, the starch of the grain being thus converted into saccharine matter, which is kiln dried, then mixed with hops, and by a further process of brewing made into a beverage.”²⁴ The term, however, is so general in its signification that the courts decline to take official notice of all the different varieties of liquor which may be thus described, and are unwilling to rule, *ex officio*, that all malt liquors are intoxicating, unless it is so declared by statute. Thus, under a law which enacts that “ale . . . and all other malt liquors shall be considered intoxicating liquors within the meaning of this chapter,” it is held that the question, “what is the malt liquor intended by and embraced in the statute,” is a question of fact for the jury, and not one of law for the court. The court which made this ruling remarked that the term in question “is a general term, embracing several kinds of liquor; what liquors are embraced in it, as well as the mode of their manufacture and the ingredients of which they are composed, is a question of fact for the jury, and not of law for the court. In every case in which the question is involved, it is competent for both parties to show by proper evidence what a malt liquor is, how it is manufactured, and of what it is composed, and also to show whether the particular liquor in controversy is or is not a malt liquor, and the jury must determine the issue upon the evidence.”²⁵ Under this rule, proof that a saloon-keeper drew from kegs and sold an article which was called “pop,” and that it was a malt liquor and would intoxicate if taken in sufficient quantities, is held to warrant a conviction for selling intoxicating liquor.²⁶

²³State v. Packer, 80 N. Car. 439.

²⁴Allred v. State, 89 Ala. 112, 8 South.

Rep. 56.

²⁵State v. Starr, 67 Me. 242. See State v. Volmer, 6 Kans. 371.

²⁶Godfreidson v. People, 88 Ill. 284.

Liquor, or Liquors.

Either of these terms, standing alone, is too wide to have a precise legal signification, unless explained by the context or by necessary inferences from the subject-matter of the statute. When thus explained, however, the word "liquor" or "liquors" is commonly understood as including all varieties of intoxicating beverages, whether spirituous, vinous, or malt.²⁷ Thus it is held that this word, as used in a federal statute providing that "there shall be no allowance for breakage, leakage, or damage on wines, liquors, cordials, or distilled spirits," includes fermented as well as distilled liquors, and covers lager beer.²⁸ So, under a statute forbidding a credit of more than ten dollars for "liquors" sold, it is held that champagne wine is included.²⁹

§ 8. Medicinal and Toilet Preparations.

Many varieties of medicines, cordials, tonics, bitters, and the like, contain a large proportion of alcohol and are capable of producing entire or partial intoxication if taken in sufficient doses. In consequence of the fact that perpetual attempts are made to evade the law by selling ardent spirits more or less effectually disguised by the addition of drugs, and called "medicine," the question of the application of the statutes to substances of this kind has frequently engaged the attention of the courts, and has been found to involve no small degree of difficulty. In one of the leading cases, the supreme court of Kansas, upon a most fair and thorough examination of the question, reached the following conclusions. First, whatever is generally and popularly known as intoxicating liquor, such as whisky, brandy, or gin, is within the prohibitions of the statute, and may be so declared as matter of law by the courts. Second, whatever is generally and popularly known as medicine, or as an article for the

²⁷ *People v. Crilley*, 20 Barb. 248;
State v. Brittain, 89 N. Car. 576.

²⁹ *Kizer v. Randleman*, 5 Jones, (N. Car.) 428.

²⁸ *Hollender v. Magone*, 38 Fed. Rep. 912.

toilet or for culinary purposes, and which is recognized, and the formula for its preparation prescribed, in some standard authority, (such as the United States Dispensatory,) and is not among the liquors ordinarily used as intoxicating beverages,—*e. g.*, tincture of gentian, paregoric, bay rum, cologne, essence of lemon,—is not within the statute, and may be so declared as matter of law by the courts, notwithstanding such articles contain alcohol and may produce intoxication. Third, as to articles intermediate between these two classes, articles not known to the standard authorities, compounds of intoxicating liquors with other ingredients, whether provided for a single case, or compounded upon a formula and sold under a specific name, as bitters, cordials, tonics, etc., whether they are within or without the statute, is a question of fact for the jury alone. And in the latter class of cases, the test is not the presence or amount of alcohol, but the adaptability of the substance to the one use or the other, as medicine or as a beverage. “If the compound or preparation,” said the court, “be such that the distinctive character and effect of intoxicating liquor are gone, that its use as an intoxicating beverage is practically impossible by reason of the other ingredients, it is not within the statute. The mere presence of the alcohol does not bring the article within the prohibition. The influence of the alcohol may be counteracted by the other elements, and the compound be strictly and fairly only a medicine. On the other hand, if the intoxicating liquor remain as a distinctive force in the compound, and such compound is reasonably liable to be used as an intoxicating beverage, it is within the statute, and this though it contain many other ingredients, and ingredients of an independent and beneficial force in counteracting disease or strengthening the system.”³⁰ The doctrine of this decision, and the justice of the test which it proposes, are amply supported by the other authorities, both earlier and later.³¹

³⁰ Intoxicating Liquor Cases, 25 Kans. 751, 37 Am. Rep. 284.

³¹ Comm. v. Ramsdell, 130 Mass. 68; United States v. Stubblefield, 40 Fed. Rep. 454; Russell v. Sloan, 33 Vt. 656; Davis v. State, 50 Ark. 17, 6 S. W. Rep.

388; State v. Muncey, 28 W. Va. 494; State v. Coulter, 40 Kans. 87, 19 Pac. Rep. 368; Wall v. State, 78 Ala. 417; Comm. v. Hallett, 103 Mass. 452; Bishop, Stat. Crimes, § 1020. In State v. Laffer, 38 Iowa, 422, it was said: “So long as

To illustrate these principles we may cite a case where the article sold was gum-camphor and alcohol, mixed by the vendor and sold as a medicine, which was held to be no violation of the law;³² and another case where a decoction of whisky with bitter herbs and barks, intoxicating, and used as a beverage, was held to be within the statute.³³ Much will depend, in this connection, upon the precise terms of the law. For example, a sale of preparations known as "Home Bitters" and "Home Sanative Cordial," containing twenty-two per cent. of alcohol, but entirely unfit to be used except as medicine, was held to be within an act prohibiting the sale of ardent spirits "and all compounds or preparations thereof, commonly called tonics, bitters, or medicated liquors."³⁴ But where the statute is not so specific in its terms, the accepted rule, in accordance with the

the liquors retain their character as intoxicating liquors, capable of use as a beverage, notwithstanding other ingredients may have been mixed therewith, they fall under the ban of the law; but when they are so compounded with other substances as to lose the distinctive character of intoxicating liquors, and are no longer desirable for use as a stimulating beverage, and are in fact medicine, then their sale is not prohibited."

³²State v. Haymond, 20 W. Va. 18, 43 Am. Rep. 787.

³³Wall v. State, 78 Ala. 417.

³⁴Gostorf v. State, 39 Ark. 450. The medicines here in question were shown by evidence at the trial to be wholesome and excellent remedies, and entirely unfit to be used as a beverage. A medical witness said: "I cannot conceive how any one could use these articles as a beverage. If taken largely, it would be an emetic." Yet it seems plain that they came within the prohibitions of the statute, and it would be difficult to point out error in the decision. The case furnishes an illustration of legislative zeal overreaching itself. The following instruction was given by the trial court and approved by the appellate court. "If the inhibitory lan-

guage of the act was confined to 'ardent, vinous, malt, or fermented liquors,' a reasonable interpretation of the act might well limit its operation to such compounds or preparations as were merely pretexts to evade the law by making sale of the prohibited articles under the thin disguise of medicated syrup instead of sugar for sweetening. But the language goes further, and expressly, in so many words, forbids the sale of 'any compounds or preparations thereof, commonly called tonics, bitters, or medicated liquors,' and this full enumeration is emphasized by being repeated five times in this act. The legislature, under its police power, is authorized to inhibit or regulate by license whatever is harmful in itself, or harmful in its indirect influence upon the community. The main object, doubtless, of the act, was to prevent the sale of such mixtures as were to be sold and used as beverages and substitutes for ardent liquors. But the legislature might well have anticipated the frauds easily perpetrated upon the law, and the consequent evasions thereof, if the state were required in each case to give the component parts and relative proportions of the tonics and bitters sold."

authorities already cited, is that the fact that a medicine does contain a certain proportion of alcohol is not of itself evidence that its sale is unlawful, and that the quantity of alcohol does not necessarily determine whether or not a liquor is intoxicating as contemplated by the prohibitions of the law.³⁵ And it is equally well settled that the question, whether or not a particular article of this general description is within the law, is a question of fact which must be passed upon by the jury, and not one which the court will undertake to determine.³⁶ The defendant is entitled to prove, if he can, that the article sold was a medicine and not liquor.³⁷ But it is no defense that he *believed* that what he sold was a medicine or was not intoxicating.³⁸ And the court, when there is reason to think that a mere evasion of the law is being attempted, may aid the jury by proper charges. Thus, an instruction relating to the sale of "nerve-tonic" by the accused is relevant, where there is evidence that nerve-tonic means rye whisky.³⁹ A druggist selling liquor without a license cannot escape liability on the ground that there was quinine in the liquor and it was sold as medicine.⁴⁰

§ 9. Bitters.

In regard to the class of infusions commonly called "bitters," the same principles which were explained in the preceding section are adjudged applicable. Whether the sale of a particular "bitters" containing alcohol is a violation of a prohibitory liquor law depends upon the question whether, in such article, the distinctive character and effect of intoxicating liquor are present, so that it may be used as an intoxicating beverage, notwithstanding the other ingredients. If it cannot be so used, if the other ingredients are medicinal, and

³⁵ Davis v. State, 50 Ark. 17, 6 S. W. Rep. 388; State v. Coulter, 40 Kans. 87, 19 Pac. Rep. 368. Compare Foster v. State, 36 Ark. 258; State v. Gray, (Conn.) 22 Atl. Rep. 675.

³⁶ Intoxicating Liquor Cases, 25 Kans. 751, 37 Am. Rep. 284; Allred v. State, 89 Ala. 112, 8 South. Rep. 56; Butler v. State, 25 Fla. 347, 6 South. Rep. 67.

³⁷ Prather v. State, 12 Tex. App. 401.

³⁸ Comm. v. Hallett, 103 Mass. 452.

³⁹ Kinnebrew v. State, 80 Ga. 232, 5 S. E. Rep. 56.

⁴⁰ Warrick v. Rounds, 17 Nebr. 411, 22 N. W. Rep. 785. See, also, United States v. White, 42 Fed. Rep. 138.

the alcohol is a necessary preservative or vehicle for them, the sale is lawful.⁴¹ But this is a fact to be ascertained by evidence and passed upon by the jury. It is not the duty, nor is it within the province, of the court, to declare, as a matter of judicial knowledge, that any particular variety of "bitters" is or is not an intoxicating liquor.⁴² Here, also, much will depend upon the language of the statute. For example, in Missouri, the law expressly includes, in the definition of intoxicating liquors, "any composition of which spirituous liquor is a part," and it is there held to be a violation of the law to sell, as a beverage, "bitters" thus compounded, notwithstanding a United States excise tax has been paid thereon, (showing that the article is classed as a medicine,) and although the federal law requires no license for the sale of the same.⁴³

§ 10. Fruits Preserved in Spirits.

One of the most popular devices for evading the liquor law was the sale of so-called "brandy peaches" and "brandy cherries." To meet this subterfuge, the courts have ruled that, whatever might be the case with genuine preserves or confectionery decocted or flavored with brandy, if the evidence disclosed that the article sold was in reality brandy or other liquor disguised by the addition of a little fruit, and sold and used, not as a palatable preserve, but as a stimulating beverage, then it would be held to be within the terms and meaning of the law.⁴⁴ Thus it was held that a merchant who kept a stock of brandy cherries in pint and quart bottles, which he sold to customers, furnishing glasses with which they might drink the brandy, was properly convicted of illegally selling liquor.⁴⁵ But the court in Arkansas, under the rule that no license is required to sell fruits preserved in spirits,—although one cannot evade the law by

⁴¹ *Carl v. State*, 87 Ala. 17, 6 South. Rep. 118; *Same v. Same*, 89 Ala. 93, 8 South. Rep. 156; *Comm. v. Pease*, 110 Mass. 412; *King v. State*, 58 Miss. 737, 38 Am. Rep. 344; *James v. State*, 21 Tex. App. 353, 17 S. W. Rep. 422.

⁴² *Allred v. State*, 89 Ala. 112, 8 South. Rep. 56.

⁴³ *State v. Lillard*, 78 Mo. 136; *State v. Wilson*, 80 Mo. 303.

⁴⁴ *Ryall v. State*, 78 Ala. 410; *United States v. Stafford*, 20 Fed. Rep. 720.

⁴⁵ *Musick v. State*, 51 Ark. 165, 10 S. W. Rep. 225.

selling a few peaches or cherries in a bottle of liquor,—holds that a sale of six peaches in a bottle with a gill of liquor, is no violation of the law.⁴⁶

§ 11. Alcohol.

Whether alcohol, in its pure state, comes within the description of “spirituous liquors” or “intoxicating liquors” is a question upon which the courts are by no means agreed. On the one hand, it has been ruled that no proof is required of the intoxicating properties of this liquid; that, as a matter of law, it is known to be an intoxicant; and that an indictment for selling intoxicating liquor is sustained by proof of a sale of alcohol.⁴⁷ But on the other hand, we have a judicial declaration that alcohol is neither ardent nor vinous spirits, and that its sale is not in any manner restricted or regulated by a prohibitory liquor law.⁴⁸ The supreme court of Illinois, while apparently unwilling to decide either way as a matter of law, inclines to the former view. In response to an objection that pure alcohol is not, in legal parlance, a spirituous liquor, that tribunal is reported as saying “it is not, in common parlance, so considered, although it is the basis of all spirituous liquors. We are not prepared to say, however, that selling pure alcohol is not selling spirituous liquor.”⁴⁹ The difficulty of the question lies in the fact that alcohol, while certainly intoxicating, is very rarely used as a beverage, but is adapted to many medicinal and mechanical uses. It is clear that no proof need be required of its intoxicating character. But the circumstances of the particular sale, the manner and purpose of it, and the characters of seller and purchaser, should be mainly consulted in determining whether it comes within the law. If a saloon-keeper sells alcohol to an intoxicated person, in order that the latter may drink it, it is evident that the law is violated. But if a druggist, not authorized to sell liquor, sells alcohol to a surgeon, to be used by the latter in preserving anatomical specimens, it is equally clear that there is no infraction of the law. In line with these principles is a decision of the court in

⁴⁶ *Rabe v. State*, 39 Ark. 204.

⁴⁸ *State v. Martin*, 34 Ark. 340.

⁴⁷ *Snider v. State*, 81 Ga. 753, 7 S. E.

⁴⁹ *Bennett v. People*, 30 Ill. 389.

Rep. 631.

Arkansas, wherein it is said: "This court does not judicially know that it [alcohol] is an intoxicating beverage, like whisky, nor that it is in common use for purposes of dissipation, nor even that it is capable of being applied to such a use. If, however, such is the case, and the liquor-seller uses this subterfuge for the purpose of pursuing his calling and evading the law, it is possible that a conviction upon an indictment for selling ardent spirits might be sustained by proof of a sale of alcohol. But a bare charge of selling alcohol discloses no criminal offense."⁵⁰

§ 12. Whisky.

Whisky is a liquor distilled from grain, possessing intoxicating properties. It is within the terms of any statute prohibiting or regulating the sale of either "intoxicating," "spirituous," or "distilled" liquors. But it is not a vinous or a malt liquor, and is not in any proper sense a "drug."⁵¹ That whisky is a spirituous and intoxicating liquor is a fact of which the courts will take judicial notice.⁵² "As every person of common intelligence knows that whisky is an intoxicating liquor, and there was no question, and could be none, as to that fact, the instruction that it was so was unobjectionable."⁵³ "As the courts are presumed to be acquainted with the meaning of English words, we must take notice that whisky is a spirit distilled from grain, and one species of the prohibited commodity. We are not required to shut our eyes to what we do know, and bring reproach upon the administration of the law by giving way to objections so utterly destitute of merit."⁵⁴ Hence it follows that an indictment for unlawfully selling whisky need not in terms allege that whisky is a spirituous or intoxicating liquor.⁵⁵ And an indictment for selling "intoxicating liquor, to wit, one pint of whisky," will be held to

⁵⁰ *State v. Witt*, 39 Ark. 216; *Winn v. State*, 43 Ark. 151.

⁵¹ *Gault v. State*, 34 Ga. 533.

⁵² *Schlicht v. State*, 56 Ind. 173; *Eagan v. State*, 53 Ind. 162; *Carmon v. State*, 18 Ind. 450; *Edgar v. State*, 37 Ark. 219; *State v. Williamson*, 21 Mo. 496; *Frese v. State*, 23 Fla. 267, 2 South Rep. 1.

⁵³ *Edgar v. State*, 37 Ark. 219.

⁵⁴ *State v. Williamson*, 21 Mo. 496.

⁵⁵ *Schlicht v. State*, 56 Ind. 173; *Eagan v. State*, 53 Ind. 162; *Carmon v. State*, 18 Ind. 450; *State v. Williamson*, 21 Mo. 496; *People v. Webster*, 2 Dougl. (Mich.) 92.

sufficiently charge the offense of selling "distilled liquor."⁵⁶ In a case in Texas, where the prosecution was for selling whisky on Sunday, it was in proof that the beverage sold was "whisky cocktail," a compound in which whisky was the predominant element. It was held that the sale was of whisky within the purview of the statute, and that there was no variance between the allegation and the proof.⁵⁷ So an indictment for selling spirituous liquor is sustained by proof of the sale of "common cordial," where that is shown to be whisky sweetened with sugar and flavored with peppermint.⁵⁸

§ 13. Brandy.

Brandy, as the derivation of the word imports, is an alcoholic liquor distilled from wine. But the name is also given to spirit distilled from other liquors, and, in the United States, to that distilled from cider and peaches.⁵⁹ In any case, it is included in the designation of "intoxicating," "distilled," or "spirituous" liquor, but is not vinous or malt. This being a matter of common knowledge, and one which the courts will officially notice, it is not necessary to allege in an indictment,⁶⁰ or for the jury to find,⁶¹ that brandy is a spirituous or intoxicating liquor. And it has been held in Indiana that the court will take judicial notice that "blackberry brandy" is an intoxicating liquor. In making this ruling, Elliott, J., remarked: "Brandy is ranked as an intoxicating liquor by writers upon the general subject, and that it is a liquor of that character is generally and commonly known. The fact is therefore one of which the courts will take judicial knowledge. The addition to the term 'brandy' of the word 'blackberry' does no more than designate it as a particular kind of brandy; it does not indicate that the liquor was not brandy of some kind. The natural and reasonable presumption is that the basis of the liquor was brandy and therefore intoxicating. If it was not, the appellant should have shown it."⁶²

⁵⁶ State v. Dengolensky, 82 Mo. 44.

⁵⁷ Galloway v. State, 23 Tex. App. 398,
5 S. W. Rep. 246.

⁵⁸ State v. Bennet, 3 Harr. (Del.) 565.

⁵⁹ Webster's Dict. s. v.

⁶⁰ State v. Munger, 15 Vt. 290.

⁶¹ State v. Wadsworth, 30 Conn. 55.

⁶² Fenton v. State, 100 Ind. 598.

§ 14. Gin.

This is an alcoholic liquor distilled from rye and barley and flavored with juniper berries. It is not necessary to allege in an indictment,⁶³ or for the jury to find as a fact,⁶⁴ that gin is a spirituous or intoxicating liquor, as that is a matter of common information. "Everybody who knows what gin is," says the court in Massachusetts, "knows not only that it is a liquor, but also that it is intoxicating. And it might as well have been objected that the jury could not find that gin was a liquor, without evidence that it was not a solid substance, as that they could not find that it was intoxicating, without testimony to show it to be so. No juror can be supposed to be so ignorant as not to know what gin is. Proof, therefore, that the defendant sold gin is proof that he sold intoxicating liquor. If what he sold was not intoxicating liquor, it was not gin."⁶⁵ And any person is competent to testify that certain liquor was gin.⁶⁶

§ 15. Rum.

Rum is defined as a kind of intoxicating liquor distilled from cane juice, or from the scummings of the boiled juice, or from treacle or molasses, or from the lees of former distillations.⁶⁷ That it is a spirituous liquor and intoxicating is a matter of common knowledge which the courts will notice judicially. Hence an averment in an indictment that the defendant sold "rum" is sufficient, without an allegation that it was a spirituous or intoxicating liquor.⁶⁸ Nor need the jury find this fact, in order to sustain a conviction.⁶⁹ It is also ruled that rum is within the meaning of the United States revenue laws, prohibiting the selling of "spirituous liquors" without first paying the tax.⁷⁰

⁶³ State v. Munger, 15 Vt. 290.

⁶⁴ State v. Wadsworth, 30 Conn. 55.

⁶⁵ Comm. v. Peckham, 2 Gray, 514.

⁶⁶ Comm. v. Timothy, 8 Gray, 480.

⁶⁷ Webster's Dict., s. v.

⁶⁸ State v. Munger, 15 Vt. 290; State v. Mooty, 3 Hill, (S. Car.) 187.

⁶⁹ State v. Wadsworth, 30 Conn. 55.

⁷⁰ United States v. Angell, 11 Fed. Rep. 34.

§ 16. Ale.

Ale is a fermented liquor made from an infusion of malt with the addition of a bitter, usually hops. In common parlance, the name is given to a heavier and stronger liquor, and containing a larger proportion of alcohol, than that denoted by the term "beer." Whether this article should be considered as falling within one or another of the general terms commonly employed in the statutes, and to what extent the courts should go in taking judicial notice of its character and its proper classification, are questions upon which great diversity of opinion has been manifested. In the first place, it seems to be admitted that ale is not a "spirituous" liquor.⁷¹ That term, as we saw in a preceding section, is properly reserved as the designation of liquors produced by distillation, and is not correctly applied to any others. But it must be here noted that a liquor sold as ale may be so mixed with spirituous liquor as to fall within the meaning of a statute which prohibits the sale of "any wine or spirituous liquor, mixed or unmixed."⁷² In New York the courts were confronted with the question whether ale was within the prohibition of an act relating to the sale of "strong or spirituous liquors." In the first case on the subject, Chancellor Walworth delivered a most exhaustive opinion, in which he collected and reviewed a vast amount of historical and other information, and concluded that the question must be answered in the affirmative.⁷³ But nine years later, the supreme court declared that this decision was unnecessary to the case in which it was made, and proceeded to rule that ale did not belong to the class of "strong liquors" forbidden to be sold without license.⁷⁴ A few years more and there was a return to the earlier holding.⁷⁵ And the latest decisions in that state inferentially favor the doctrine that this liquor not only comes within the statute but is judicially known to be intoxicating.⁷⁶ In the next place, it is said

⁷¹ Fleming v. New Brunswick, 47 N. J. Law, 231; Walker v. Prescott, 44 N. H. 511.

⁷² Walker v. Prescott, 44 N. H. 511.

⁷³ Nevin v. Ladue, 3 Denio, 43, 437.

⁷⁴ People v. Crilley, 20 Barb. 246.

⁷⁵ Comm'rs of Excise v. Freeoff, 17 How. Pr. 442.

⁷⁶ Comm'rs of Excise v. Taylor, 21 N. Y. 173; Rau v. People, 63 N. Y. 277;

that a court judicially recognizes the fact that ale is a "malt" liquor,⁷⁷—which it could scarcely fail to do if professing any acquaintance with the language. But whether it can be known, without evidence, that this is an "intoxicating" liquor is as yet an unsettled question. In Ohio, it is held that ale is included under this designation, save where it is expressly excepted by statute.⁷⁸ And there are *dicta* in New York to the same general effect.⁷⁹ But in the other states, it appears to be the rule that the question whether ale is an "intoxicating liquor" is one of fact, to be determined by the jury,⁸⁰ although it is said the question may be submitted to the jury without evidence.⁸¹ Of course, if the statute declares that ale shall be included among intoxicating liquors within its meaning, it is not necessary for the jury to find as a fact that it is intoxicating.⁸²

§ 17. Beer.

On examining the decisions which have had to do with the definition and classification of this species of beverage, the reader will at once discover a great conflict of opinion. The questions involved are by no means free from difficulty, but it is believed that they will admit of solution on sound and reasonable grounds. In the first place, it is conceded by all the authorities that beer is not included in the designation of either "vinous" or "spirituous" liquors as these terms are used in the statutes.⁸³ Hence, if it is within the terms of any given law at all, it must be either because it is specifically named or because it belongs to the class of "malt" liquors or "strong" liquors or is included in the general term "intoxicating." But now let us suppose that a liquor charged to have been sold in violation of law is described in the indictment as "beer," or that the evidence

Blatz v. Rohrbach, 116 N. Y. 450, 22 N. E. Rep. 1049.

⁷⁷ Wiles v. State, 33 Ind. 206.

⁷⁸ Johnston v. State, 23 Ohio St. 556.

⁷⁹ Rau v. People, 63 N. Y. 277; Blatz v. Rohrbach, 116 N. Y. 450, 22 N. E. Rep. 1049.

⁸⁰ State v. Biddle, 54 N. H. 379; State

v. Barron, 37 Vt. 57; Haines v. Hanrahan, 105 Mass. 480.

⁸¹ State v. Barron, 37 Vt. 57.

⁸² State v. Wadsworth, 30 Conn. 55.

⁸³ State v. Brindle, 28 Iowa, 512; Tinker v. State, (Ala.) 8 South. Rep. 855; Fritz v. State, 1 Baxt. 15.

shows a sale of "beer," without anything to give it greater particularity of description. Is this, of itself, sufficient to sustain a conviction? That this question admits of any doubt is due to two facts; first, that the word "beer" is used as a generic term, including both a class of alcoholic liquors, and a class of non-intoxicating beverages, made from the roots or other parts of various plants, although the latter are almost always described by the addition of a term showing their origin, as "spruce beer," "ginger beer," and the like; and second, that, in the case of beers made from malt and hops, some of the courts have declined to know officially that they possessed intoxicating properties. Accordingly, we find numerous cases supporting the rule that there is no presumption of law that a liquor described simply as "beer" is a malt liquor, and that evidence of sales of "beer" is not enough without showing that it was "malt," "strong," or "intoxicating" beer.⁸⁴ "It would seem," says the court in New York, "that a term which included both intoxicating and non-intoxicating liquors could not be said, in its ordinary meaning, necessarily to imply an intoxicating drink, unless such import has been given to it either by statute or by the decision of the courts."⁸⁵ But this is not the approved rule. On the contrary, the preponderance of authority is to the effect that when the word "beer" is used, without any restriction or qualification, it denotes an intoxicating malt liquor; that when thus occurring in an indictment or complaint, or in the evidence, it is presumed to include only that species of beverage; and that, being taken in this sense, it will be sufficient, unless it is shown by evidence that the particular liquor so described was non-alcoholic.⁸⁶

⁸⁴ *State v. Beswick*, 13 R. I. 211; *Blatz v. Rohrbach*, 116 N. Y. 450, 22 N. E. Rep. 1049; *Comm. v. Hardiman*, 9 Gray, 136; *Pekin v. Smelzel*, 21 Ill. 464; *Hausberg v. People*, 120 Ill. 21, 8 N. E. Rep. 857; *Netso v. State*, 24 Fla. 363, 5 South. Rep. 8. Note that the following Indiana decisions holding this doctrine have been *overruled*: *Weis v. State*, 33 Ind. 204; *Klare v. State*, 43 Ind. 433; *Lathrope v. State*, 50 Ind. 555; *Schlosser v. State*, 55 Ind. 82; *Plunkett v. State*, 69 Ind. 68; *Kurz v. State*, 79 Ind. 438.

Compare *Myers v. State*, 93 Ind. 251; *Stout v. State*, 96 Ind. 407.

⁸⁵ *Blatz v. Rohrbach*, 116 N. Y. 450, 22 N. E. Rep. 1049.

⁸⁶ *People v. Wheelock*, 3 Park. (N. Y.) 9; *Comm'rs of Excise v. Freeoff*, 17 How. Pr. 442; *Murphy v. Montclair*, 39 N. J. Law, 673; *Myers v. State*, 93 Ind. 251; *Stout v. State*, 96 Ind. 407; *Welsh v. State*, 126 Ind. 71, 25 N. E. Rep. 883; *State v. Lemp*, 16 Mo. 389; *State v. Houts*, 36 Mo. App. 265; *State v. Teisedre*, 30 Kans. 476, 2 Pac. Rep. 650;

This position seems to us unquestionably sound. It is supported by the following reasons. First, it is only in a secondary or derivative sense that the word "beer" is used as descriptive of any liquor other than malt beer. Second, when used in relation to any non-alcoholic extract or infusion, it is properly (and almost invariably) qualified by the addition of a descriptive term, as "root beer," "spruce beer," "ginger beer," etc. Third, when used in bar-rooms and drinking saloons, and generally in connection with the sale of intoxicants, the word "beer" never denotes anything but an intoxicating malt liquor.⁸⁷

But in the next place, assuming that "beer" always denotes a malt and fermented liquor containing alcohol,—or assuming that it is more particularly described, so as to bring it distinctly within that class, as by calling it "lager beer,"—the question arises whether evidence of its intoxicating properties is required. The weight of authority appears to be with the cases holding that courts will take judicial notice that beer of this variety is intoxicating, and that it need not

State v. Jenkins, 32 Kans. 477, 4 Pac. Rep. 809; Kerkow v. Bauer, 15 Neb. 150, 18 N. W. Rep. 27; Briffitt v. State, 58 Wis. 39, 16 N. W. Rep. 39; Watson v. State, 55 Ala. 658.

⁸⁷ This position was taken in the case of Myers v. State, 93 Ind. 251, where the court was so convinced of its soundness as to go to the length of overruling a whole line of its previous decisions. We quote the following from the opinion by Judge Niblack: "Webster defines beer to be 'a fermented liquor made from any malted grain, with hops and other bitter flavoring matters.' In other words, it is a malt liquor, which the same author declares to be 'a liquor prepared for drink by an infusion of malt, as beer, ale, porter, etc.' It may therefore be said that beer is a liquor infused with malt, and prepared by fermentation for use as a beverage. As a consequence, when 'beer' is called for at a place at which intoxicating drinks are sold, the bartender, having in view the primary meaning, as well as the common use, of the word,

is justified in inferring, and must reasonably infer, that malt and fermented beer is wanted. If any other kind of beer is desired, it is expected that qualifying words will be used, such as spruce beer, root beer, small beer, ginger beer, and the like, thus attaching a remote and secondary meaning to the word 'beer,' as descriptive of particular beverages. When, therefore, a witness testifies to the sale or giving away of beer, under circumstances which make the sale or giving away of any intoxicating liquor unlawful, the *prima facie* inference is that the beer was of that malted and fermented quality declared by the statute to be an intoxicating liquor, and the court trying the cause ought to take judicial notice of the inference which thus arises from the use of the word 'beer' in its primary and general sense. These views are fully sustained by the recent case of Briffitt v. State, 58 Wis. 39, [s. c. 16 N. W. Rep. 39, 46 Am. Rep. 621.] and to a greater or less extent by the cases of Comm. v. Anthes, 12 Gray, 29; People v. Wheel-

be shown to be so by evidence.⁸⁸ But there are also decisions to the effect that lager beer must be shown to be capable of producing entire or partial intoxication, and that this is a fact to be ascertained by the jury upon the evidence in the case.⁸⁹ In some of the earlier statutes and decisions, similar questions arose in relation to the character and *status* of what was then denominated "strong beer." This term, though now practically obsolete, was once in familiar use as the name of a species of beer made of malt and hops, and so called in order to distinguish it from "small beer," which was compounded of molasses and yeast with the addition of either ginger or spruce, and which contained a very small percentage of alcohol. The "strong beer" seems to have been rich in the intoxicating principle, chemical analysis (in one of the reported cases) showing the presence of alcohol in the proportion of eight per cent. And the courts had no difficulty in determining that this particular beverage was an intoxicating liquor within the meaning of the statutes on that subject.⁹⁰ But, as it differed from the lager beer of modern commerce both in the process of its manufacture and in the proportion of alcohol contained,

ock, 3 Park. (N. Y.) 9; *Nevin v. Ladue*, 3 Denio, 43; *Board, etc., v. Taylor*, 21 N. Y. 173; *State v. Goyette*, 11 R. I. 592; *Rau v. People*, 63 N. Y. 277. The strongest case relied upon by counsel for the appellant to support their position is that of *Klare v. State*, 43 Ind. 483. But that case arose under the act of Feb. 27th, 1873, commonly known as the Baxter Bill, which contained no provision declaring what should be taken and construed to be intoxicating liquors, and that circumstance is referred to in the opinion as an important, if not significant, omission, in view of the fact that the preceding act of Mar. 5th, 1859, on the same general subject, contained such a provision. The subsequent cases relied upon by appellant's counsel appear to have inadvertently followed the case of *Klare v. State*, *supra*, without observing that the act of Mar. 17th, 1875, enacted in effect that malt liquor must be held to

be an intoxicating liquor, and without, perhaps, inquiring with sufficient care into the primary meaning of the word 'beer' as used in ordinary parlance, a meaning to which recently more attention has been given. The subsequent cases thus referred to are *Lathrope v. State*, 50 Ind. 555; *Schlosser v. State*, 55 Ind. 82; *Shaw v. State*, 56 Ind. 188; *Plunkett v. State*, 69 Ind. 68; *Kurz v. State*, 79 Ind. 488."

⁸⁸ *Briffitt v. State*, 58 Wis. 39, 16 N. W. Rep. 39; *State v. Goyette*, 11 R. I. 592; *State v. Rush*, 13 R. I. 198; *Waller v. State*, 38 Ark. 656.

⁸⁹ *People v. Zeiger*, 6 Park. (N. Y.) 855; *People v. Schewe*, 29 Hun, 122; *Comm. v. Bloss*, 116 Mass. 56.

⁹⁰ *Markle v. Akron*, 14 Ohio, 586; *People v. Hawley*, 3 Mich. 330; *Excise Comm'rs v. Taylor*, 21 N. Y. 173; *Nevin v. Ladue*, 3 Denio, 43, 437. Compare *People v. Crilley*, 20 Barb. 246.

(the latter being a very much lighter fluid,) the courts appear to be unwilling to be bound, in their judicial dealings with the beer of to-day, by the precedents relating to the beer of a past generation. At least, there are some decisions, particularly in New York, not explainable on any other hypothesis.⁹¹

Under a statute (as in Massachusetts) expressly declaring that lager beer shall be deemed to be an intoxicating liquor, it is not incumbent on the prosecution to prove, nor is it permissible for the defendant to attempt to disprove, the actual intoxicating properties of this liquor.⁹² But in regard to varieties of beer not named in the act, or not of the familiar kinds already spoken of, the test of the lawfulness of their sale will be found in their character as intoxicating or the reverse, and this must be ascertained by proper evidence. For instance, upon a trial for illegally selling "spirituous and malt liquors," evidence against the defendant that he sold a drink called "New Era Beer," which was *not intoxicating*, will not warrant a conviction.⁹³ On the other hand, to a charge of keeping a liquor nuisance it is no defense that the accused did not know, and had no reason to believe, that "hop beer" kept by him contained such a proportion of alcohol as to render its sale illegal.⁹⁴ But the fact that a given species of beer (as "Schenck beer") contains a certain percentage of alcohol, or that a gallon of the beer contains as much alcohol as does a pint of whisky, is not conclusive upon the question whether or not the beer is intoxicating.⁹⁵

⁹¹Such is the case of *Rau v. People*, 63 N. Y. 277, wherein the court, while declining to take judicial notice that lager beer is intoxicating, held that judicial notice might be taken of the fact that "such well-known beverages as whisky, brandy, gin, ale, and *strong beer* are intoxicating." Such also is the case of *People v. Hart*, 24 How. Pr. 289, where it was held that the court cannot take judicial notice that lager beer belongs to the prohibited character or

class of liquors designated in a statute as "beer,"—a decision which was clearly erroneous. See, also, *People v. Henschel*, (Sup.) 12 N. Y. Supp. 46.

⁹²*Comm. v. Anthes*, 12 Gray, 29; *Comm. v. Bubser*, 14 Gray, 88; *Comm. v. Snow*, 133 Mass. 575.

⁹³*Connolly v. City of Atlanta*, 79 Ga. 664, 4 S. E. Rep. 263.

⁹⁴*Comm. v. O'Kean*, (Mass.) 26 N. E. Rep. 97.

⁹⁵*Comm. v. Blos*, 116 Mass. 56.

§ 18. Cider.

It is agreed by the best authorities that cider is not properly included in either of the terms "spirituous" or "vinous" liquors as used in the statutes.⁹⁶ On this point it is very pertinently remarked: "If the statute might include among the 'vinous' fluids those which come from the juice of fruits which grow on vines and bushes, and are named wine, we do not think it should be construed so liberally as to apply the term 'vinous' to the juice of fruits which grow on trees. And in common parlance, cider and beer are never called vinous liquors or wine."⁹⁷ But if the statute mentions only "intoxicating" liquors, it is an open question whether cider is included, with the balance of authority inclining to the position that it is so included after fermentation but not before. Thus, in Massachusetts it is said that there is no legal presumption that all cider is intoxicating liquor.⁹⁸ In Illinois, the statute mentioning spirituous, vinous, and malt liquors, and cider not belonging to either of these classes, it is held not to be intoxicating unless actually proved so.⁹⁹ In New Hampshire, whether fermented cider is an intoxicating liquor is a question for the jury.¹⁰⁰ In Iowa, where the statute enumerates alcohol, ale, wine, beer, etc., "and all intoxicating liquors whatever," it is held that cider is included in the phrase quoted.¹⁰¹ And so one of the federal courts, speaking of hard cider, says: "It is common knowledge that a fermented beverage which contains from five to ten per cent. of

⁹⁶ *State v. Oliver*, 26 W. Va. 422, 53 Am. Rep. 79; *Feldman v. Morrison*, 1 Ill. App. 460. There is, however, a decision in Pennsylvania to the effect that the question whether cider is a vinous or spirituous liquor is a question of fact for the jury. *Comm. v. Reyburg*, 122 Pa. St. 299, 16 Atl. Rep. 351. In this case Green, J., observed; "We do not mean to intimate that the mere unfermented juice of apples is in any circumstances to be regarded as either a vinous or spirituous liquor, but we do not know, and cannot say, as a matter

of law, that its character may not be so changed by fermentation as to bring it within the meaning of the term 'vinous.' Of course an admixture with spirits might render the compound 'spirituous.' "

⁹⁷ *Feldman v. Morrison*, 1 Ill. App. 460.

⁹⁸ *Comm. v. Chappel*, 116 Mass. 7.

⁹⁹ *Feldman v. Morrison*, 1 Ill. App. 460.

¹⁰⁰ *State v. Biddle*, 54 N. H. 379.

¹⁰¹ *State v. Hutchison*, 72 Iowa, 561, 84 N. W. Rep. 421.

alcohol, which is freely drunk by the glassful, will produce intoxication. This is a fact of daily observation in communities where such beverages are sold." ¹⁰²

In the next place, if the statute, in its enumeration of the prohibited articles, or in its definition of the term "intoxicating," mentions "fermented" liquor, it is clear that this will include hard cider but not sweet cider. ¹⁰³ Moreover, the courts will take judicial notice that when the term "hard cider" is used in court by a witness it means fermented cider—a species of fermented liquor—and is within the prohibition of the statute. "If the witnesses for the state had testified that they drank cider,—not hard cider,—then, under the definitions of Webster and some of the other lexicographers, we would not presume that the cider was fermented and intoxicating. Hard cider is cider excessively fermented, and therefore, presumptively, hard cider is not only a fermented liquor but intoxicating. Under the statute, all fermented liquor is presumed to be intoxicating, and if the defendant denies that the fermented liquor sold by him is intoxicating, it devolves upon him to remove the presumption of law by evidence." ¹⁰⁴ But again, the statute may mention "cider" by name, and then it becomes a question whether the prohibition applies to sweet or unfermented cider, or is to be restricted to the fermented article alone. On the authority of the lexicographers, and according to some of the decisions, the unfermented product is not properly included in the term. In strictness, the juice of the apple before fermentation is simply apple-juice, and it is only by fermentation that it becomes cider. ¹⁰⁵ But it must be conceded that this does not agree with the popular and ordinary use of the word. And the authorities generally rule that if the prohibition of the statute is directed to the sale of "cider," without any qualifying adjective, it applies to all cider, regardless of the stage of fermentation or its

¹⁰² Eureka Vinegar Co. v. Gazette Printing Co., 35 Fed. Rep. 570.

¹⁰³ People v. Foster, 64 Mich. 715, 31 N. W. Rep. 596; Eureka Vinegar Co. v. Gazette Printing Co., 35 Fed. Rep. 570; Berger v. State, (Ark.) 11 S. W. Rep.

765; State v. Schaefer, 44 Kans. 90, 24 Pac. Rep. 92.

¹⁰⁴ State v. Schaefer, 44 Kans. 90, 24 Pac. Rep. 92; State v. McLafferty, (Kans.) 27 Pac. Rep. 843.

¹⁰⁵ Eureka Vinegar Co. v. Gazette Printing Co., 35 Fed. Rep. 570.

intoxicating quality.¹⁰⁶ In cases other than those enumerated, the doctrine is that the courts will not decide, as a matter of law, upon the character and properties of this beverage, but the question of its being included in the statute is one of fact for the jury.¹⁰⁷ Hence, where it is shown that the defendant sold hard cider, an analysis of the cider by a chemist, to determine the amount of alcohol therein, is admissible in evidence, where all the circumstances connected with the analysis go to the jury to enable them to determine the weight of the evidence.¹⁰⁸ But in a prosecution for selling a certain fluid called "peach cider," as an intoxicating beverage, it is error to charge, as a matter of law, that if it contains six per cent. of alcohol it is intoxicating, within the meaning of the statute, as that is a question of fact for the jury under proper instructions.¹⁰⁹

§ 19. Tavern.

The signification of this term has frequently been called in question under the statutes regulating the sale of intoxicating liquors, and particularly the license laws of the various states. In its original meaning, the word denoted a house of public entertainment, for the accommodation of travelers and transient guests, and especially for the sale of liquor by the dram to be drunk on the premises. Accordingly, in Kentucky, South Carolina, and Ohio, it is held that a license to keep a tavern includes the privilege of retailing intoxicating liquors to be consumed on the spot.¹¹⁰ "The term 'tavern-keeper,'" says the court in the last-named state, "has for many years past been understood to import a person licensed to retail liquor at a house kept by him for public entertainment. A license to keep a tavern, therefore, in its ordinary signification, was understood to be a license to retail

¹⁰⁶ State v. Spaulding, 61 Vt. 505, 17 Atl. Rep. 844; Comm. v. Dean, 14 Gray, 99; State v. McNamara, 69 Me. 133; State v. Roach, 75 Me. 123. Compare Guptill v. Richardson, 62 Me. 257.

¹⁰⁷ Comm. v. Reyburg, 122 Pa. St. 299, 16 Atl. Rep. 351; State v. Biddle, 54 N. H. 379.

¹⁰⁸ State v. Schaefer, 44 Kans. 90, 24 Pac. Rep. 92.

¹⁰⁹ City of Topeka v. Zufall, 40 Kans. 47, 19 Pac. Rep. 359.

¹¹⁰ Comm. v. Kamp, 14 B. Mon. 385; Braswell v. Comm., 5 Bush, 544; State v. Chamblyss, 1 Cheves, 220, 34 Am. Dec. 593; Hirn v. State, 1 Ohio St. 15, overruling Curtis v. State, 5 Ohio, 324.

liquors and keep a house of entertainment."¹¹¹ And it is probable that the word carries the same meaning, in its popular or its legal sense, in some other states. But elsewhere,—so far as the reported decisions show the usage,—it is considered that the selling of liquors is not an essential element of the business designated as tavern-keeping, and that a license to keep a tavern does not, *ex vi termini*, import an authority to retail spirituous liquors.¹¹² Now it has been held that the words "tavern" and "tavern-keeper" are synonymous with "inn" and "inn-holder," as the latter terms were used at common law.¹¹³ And as the possession of a license to sell liquor does not make a person an inn-holder at common law, nor the want of it prevent him from being such,¹¹⁴ it follows that the authorities so holding must be classed with those which refuse to recognize the right to retail intoxicants as a necessary privilege of a tavern-keeper, thus creating a preponderance of authority on this side of the question in any jurisdiction where it is *res integra* and not pre-determined by the popular usage. In New York, it is held that a restaurant or a lodging-house is not an inn such that the proprietor can claim a license to sell liquor, under a law allowing licenses to inn-keepers. And the fact that a lodging-house sometimes furnishes meals will not constitute it an inn. But a house kept on the "European plan" is an inn.¹¹⁵

§ 20. Tippling-House.

This term, frequently used in the statutes relating to our principal subject-matter, may be defined, generally, as a place where intoxicating drinks are sold in drams or small quantities, to be drunk on the premises, and where men resort for drinking purposes.¹¹⁶ Further than this, however, we cannot go without taking into account local

¹¹¹ *Hirn v. State*, 1 Ohio St. 15.

¹¹² *State v. Cloud*, 6 Ala. 628; Page v. State, 11 Ala. 849; *Savner v. Chipman*, 1 Mich. 116; *Benson v. Moore*, 15 Wend. 260; *City of St. Louis v. Siegrist*, 46 Mo. 593.

¹¹³ *Overseers, etc., v. Warner*, 3 Hill, (N. Y.) 150; *Bonner v. Wellborn*, 7 Ga. 296.

¹¹⁴ *Norcross v. Norcross*, 53 Me. 163.

¹¹⁵ *Kelly v. Excise Comm'rs*, 54 How. Pr. 327.

¹¹⁶ *Emporia v. Volmer*, 12 Kans. 622; *Koop v. People*, 47 Ill. 327; *Woods v. Comm.*, 1 B. Mon. 74; *Patten v. Centralia*, 47 Ill. 370; *Moore v. State*, 9 Yerg. 353; *Bishop, Stat. Crimes*, § 1065.

variations in the meaning and legal construction of the term. Thus, in Kansas, it is an element of the act of keeping a tippling-house that the proprietor should not be licensed to retail liquors.¹¹⁷ But in Kentucky, the keeping of such house may be complete with or without such license.¹¹⁸ To "keep open" a tippling-house, however, it is necessary, as one of the ingredients of the offense, that liquor should be sold or drunk there.¹¹⁹ But it is not essential that the liquor should be spirituous liquor or wine; a place where *beer* is sold by the glass or drink may constitute a tippling-house within the meaning of the statute.¹²⁰ It should be observed that the terms "tippling-house" and "disorderly house" are not synonymous or identical in meaning, nor is either necessarily included in the other.¹²¹ The term "liquor-shop," as used in a statute, may apply to a dwelling-house where liquor is sold, if that is the business of the occupant.¹²²

§ 21. Saloon.

This term, according to the dictionaries, is used in its popular sense, of "a public room for specific uses; especially a bar-room or grog-shop; as, a drinking saloon, an eating saloon, a dancing saloon."¹²³ But the courts are disposed to hold that the word has not acquired any technical legal signification which would restrict it to the designation of a house kept for retailing intoxicating liquor.¹²⁴ For example, a city ordinance requiring "saloon-keepers" to take out a license, and pay a substantial license tax, is not in violation of a clause in the constitution forbidding licenses for the sale of intoxicating liquors; because, a saloon not being necessarily a place for selling such liquors, such a license would in no way legalize the sale of any article forbidden by law.¹²⁵ So in a case in Iowa, the court ruled that a place was a "saloon" where refreshments, not prohibited by law, were sold, as well as intoxicating beverages; quoting

¹¹⁷ *Emporia v. Volmer*, 12 Kans. 622.

¹¹⁸ *Woods v. Comm.*, 1 B. Mon. 74.

¹¹⁹ *Fant v. People*, 45 Ill. 259.

¹²⁰ *Koop v. People*, 47 Ill. 327.

¹²¹ *Emporia v. Volmer*, 12 Kans. 622.

¹²² *Wooster v. State*, 6 Baxt. 533.

¹²³ Webster's Dict., s. v.

¹²⁴ *State v. Mansker*, 36 Tex. 364.

¹²⁵ *Kitson v. Mayor of Ann Arbor*, 26 Mich. 325; *Wolf v. Lansing*, 53 Mich. 367, 19 N. W. Rep. 38.

the definition of Webster, and adverting to the fact that "temperance saloon" is a common designation for places where non-intoxicating drinks and other refreshments are kept for sale.¹²⁶ In Nebraska, however, it is said that the word in question has acquired a restricted meaning, being usually applied only to places where liquors are sold. And therefore it is held that a licensed saloon-keeper means a person licensed to sell intoxicating liquors.¹²⁷

§ 22. Bar-Room.

A place is a "bar-room" when it is used or occupied for the purpose of retailing intoxicating liquors to be drunk on the premises, its legal character being determined by the business for which it is occupied.¹²⁸ And the same meaning is to be attached to the equally familiar term "dram-shop."

§ 23. Wholesaler and Retailer.

The term "wholesale" implies selling in or by unbroken parcels, as by the barrel, pipe, cask, etc., while the term "retail" implies the cutting up or dividing of such pieces, or parcels, or casks, into smaller quantities, and selling to customers in such manner.¹²⁹ As a general rule, however, the statutes have undertaken to regulate this distinction, by prescribing that all sales of less than a given quantity should be considered sales at retail, and all sales above that quantity sales at wholesale. The quantity fixed upon as the dividing point has varied greatly, according to the policy of different legislatures at different times and places. In the early New England laws it was twenty-eight gallons. In the United States internal revenue laws, as regards malt liquors, it is five gallons.¹³⁰ In Georgia it is one quart.¹³¹

¹²⁶ *Clinton v. Grusendorf*, 79 Iowa, 117, 45 N. W. Rep. 407.

¹²⁷ *McDougall v. Giacomini*, 13 Nebr. 431, 14 N. W. Rep. 450.

¹²⁸ *Ex parte Schneider*, 11 Oreg. 288, 8 Pac. Rep. 289; *Bieser v. State*, 79 Ga. 326, 4 S. E. Rep. 257.

¹²⁹ *Gorsuth v. Butterfield*, 2 Wis. 237; *Webb v. Baird*, 11 Lea, 667.

¹³⁰ *United States v. Clare*, 2 Fed. Rep. 55.

¹³¹ *Bieser v. State*, 79 Ga. 326, 4 S. E. Rep. 257.

In reason, however, and upon a right use of language, the distinction between wholesale and retail (in the absence of statutory definitions) should be made to depend not solely upon the quantity sold, but also upon the purpose of the sale and the character of the purchaser. Thus the court in Tennessee rightly rules that a wholesale liquor dealer is one who sells to purchasers in packages or quantities for the purposes of trade or to be resold; while a retail dealer is one who sells to consumers for the purpose of consumption.¹³² Still, some of the courts have been willing to rest a distinction upon quantity alone. For instance, where a town was authorized to control the "retail" of spirituous liquors, and it passed an ordinance that no one should sell such liquors in a less quantity than twenty gallons, it was held that there was no power to pass such an ordinance, twenty gallons being too great a quantity to be embraced in the word "retail."¹³³ In this connection it is necessary to advert to the meaning of the word "dealer." "A dealer," it is said, "is not one who buys to keep, or makes to sell, but one who buys to sell again." Brewers of beer and manufacturers of spirituous liquors make to sell, and therefore are not dealers in the statutory meaning or legal sense of the word.¹³⁴ But within the meaning of the United States internal revenue laws, one is engaged in the business of a retail liquor dealer, if he has liquor on hand to be sold to any one who applies for it.¹³⁵

¹³² Webb v. Baird, 11 Lea, 667.

¹³³ Harris v. Livingston, 28 Ala. 577.

¹³⁴ Comm. v. Rhodes, 1 Pittsb. 499;
Taylor v. Vincent, 12 Lea, 282, 47 Am.
Rep. 338.

¹³⁵ United States v. Rennecke, 28 Fed.
Rep. 847. See, also, United States v.
Smith, 45 Fed. Rep. 115; United States
v. Starnes, 37 Fed. Rep. 665; United
States v. Allen, 38 Fed. Rep. 786.

CHAPTER II.

GENERAL THEORY OF THE POLICE POWER.

- § 24. Definitions of the Police Power.
- 25. Scope of the Police Power.
- 26. Examples of Application of the Power.
- 27. Police Power Limited by the Federal Constitution.
- 28. Laws Impairing the Obligation of Contracts.
- 29. Regulation of Commerce.
- 30. Rights of Citizens of Other States.
- 31. Application of the Police Power to the Liquor Traffic.
- 32. Police Power Distinguished from Eminent Domain.

§ 24. Definitions of the Police Power.

All statutes regulating or prohibiting the manufacture and sale of intoxicating liquors are enacted in virtue of what is termed the "police power" of the state. And in every case in which their validity has been sustained, as against objections to the legislative authority, under either the federal or state constitution, it has been on the ground that such enactments came rightly within the scope of this comprehensive and salutary power. It therefore becomes important, in this connection, to ascertain the general nature and limitations of the police power. It would be foreign to our present purpose, and a work of too great magnitude, to enter upon an exhaustive discussion of the constitutional relations of this function of government, but we shall briefly outline, in the present chapter, its foundation and scope.

In its most general sense, *police* is the function of that branch of the administrative machinery of government which is charged with the preservation of public order and tranquillity, the promotion of the public health, safety, and morals, and the prevention, detection, and punishment of crimes.¹ And the police power is the

¹ Black's Law Dict. s. v. "The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but

power vested in a state to establish laws and ordinances for the regulation and enforcement of its police, as just defined. It is, according to the supreme court of Massachusetts, "the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same."² In the language of another court, "it is true that the legislation which secures to all protection in their rights, and the equal use and enjoyment of their property, embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community comes within its scope; and every one must use and enjoy his property subject to the restrictions which such legislation imposes. What is termed the 'police power' of the state, which, from the language often used respecting it, one would suppose to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects."³

But in truth, as remarked by the United States supreme court, while many attempts have been made to define the police power, the endeavor has never met with entire success. "It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate."⁴ It cannot be doubted, however, that the origins of this power must be sought in the very pur-

also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others." Cooley, Const. Lim. 572.

² Comm. v. Alger, 7 Cush. 53, 85. See further, City of New York v. Miln, 11

Pet. 139; License Cases, 5 How. 631; Webber v. Virginia, 103 U. S. 348; Escanaba Trans. Co. v. Chicago, 107 U. S. 683, 2 Sup. Ct. Rep. 185; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. Rep. 357; Beer Co. v. Mass., 97 U. S. 25; New Orleans Gas-Light Co. v. Louisiana Light Co., 115 U. S. 650, 6 Sup. Ct. Rep. 252.

³ Munn v. Illinois, 94 U. S. 145.

⁴ Stone v. Mississippi, 101 U. S. 814, 818.

pose and framework of organized society. It is fundamental and essential to government. It is a necessary and inherent attribute of sovereignty. It antedates all laws, and may be described as the assumption on which constitutions rest. For the state—whether we regard it as an association of individuals or as a moral organism—must have the right of self-protection, and the power to preserve its own existence in safety and prosperity, else it could neither fulfill the law of its being nor discharge its duties to the individual. And to this end it is necessarily invested with power to enact such measures as are adapted to secure its own authority and peace, and preserve its constituent members in safety, health, and morality. Theories of the state, according as they tend to enlarge or restrict the legitimate sphere of its functions and activities, will create theories as to the proper limitations of the police power. But its existence, in a measure proportioned to the rights and duties it is to guard, is implied in the recognition of the state as a factor in law and civilization. "It is a power," as has been well said, "essential to self-preservation, and exists, necessarily, in every organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity."⁵ For these reasons it appears that the nature and authority of the police power are best described by the maxim, *salus populi suprema lex*, while the principle, *sic utere tuo ut alienum non ledas*, furnishes, in most cases, a convenient rule for its application.

§ 25. Scope of the Police Power.

There is a certain broad and general sense in which the scope of the police power may be made to include all legislation and to embrace almost every function of civil government. In this signification, the authority of the state to create educational and charitable institutions, to provide for the establishment and control of public highways, turnpikes, canals, wharves, ferries, and telegraph lines, to direct the reclamation of swamp lands, etc., may be referred to the power in question.⁶ But there is also a more particular and restricted sense,

⁵ License Cases, 5 How. 588, McLean, J.

⁶ New Orleans Gas-Light Co. v. Louisiana Light Co., 115 U. S. 650, 661, 6 Sup. Ct. Rep. 252.

in which the term is almost always used when it enters into the discussion of constitutional questions, and especially in connection with our present subject. And in this meaning, its scope is limited to the protection and preservation of three elements in the general welfare, viz., the public safety, the public health, and the public morals.⁷ Thus, in an important case before the supreme federal tribunal, it was said: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."⁸ But here it must be remarked that it is not possible by any logical deduction from the adjudged cases or the nature of the subject, to stretch the proper limits of the police power so as to make it include matters which are merely connected with the *convenience* of the public. There are certain decisions which might, at first blush, appear to lend countenance to such a proposition, but an attentive consideration will show that they either used the term in its broad and general sense, or had reference to matters which concerned the safety of the people, rather than their convenience.⁹

§ 26. Examples of Application of the Power.

In order to more fully define and more clearly illustrate the nature and scope of the police power, it will be proper here to adduce some

⁷ New Orleans Gas-Light Co. v. Louisiana Light Co., 115 U. S. 650, 672, 6 Sup. Ct. Rep. 252; Gibbons v. Ogden, 9 Wheat. 203; Black, Const. Prohib. §§ 62, 63.

⁸ Beer Co. v. Massachusetts, 97 U. S.

25, 33, Bradley, J.; Boyd v. Alabama, 94 U. S. 645; Thorpe v. Rutland & B. R. Co., 27 Vt. 140.

⁹ Black, Const. Prohib. § 64; State v. Noyes, 47 Me. 189, 212.

examples of its application to subjects admittedly within its sphere. And first in relation to the public safety. It is on this ground that the courts have sustained the validity of laws regulating the grade of railways and prescribing how and upon what grade their tracks shall cross each other;¹⁰ of laws regulating the speed of trains at highway and other crossings;¹¹ of regulations requiring railroads to ring the bell or blow the whistle of their locomotives immediately before passing grade crossings or other dangerous places;¹² of statutes or ordinances establishing fire-limits in cities;¹³ of laws to prohibit the keeping of gunpowder in unsafe quantities in cities and villages;¹⁴ and of many other similar enactments.¹⁵ Next as to the protection and preservation of the public health. In this connection we may cite the case of *Taunton v. Taylor*,¹⁶ in which it was held that a statute giving to a board of health the power to forbid the exercise within the limits of a city of any trade which was a nuisance or hurtful to the inhabitants, or dangerous to the health of the community, or attended by noisome or injurious odors, was valid and constitutional. So it is fully within the power of the legislature to regulate the business of slaughtering cattle in populous towns, by limiting its prosecution to particular localities or quarters therein.¹⁷ And on the same principle, the laws passed in many of the states, to prohibit or regulate the manufacture and sale of "oleomargarine," or other imitations of butter or fraudulent substitutes for it, were universally held valid and constitutional, as legitimate exertions of the police power of the state.¹⁸ Finally, although the state may not

¹⁰ Fitchburg R. Co. v. Grand Junction R. Co., 1 Allen, 552; Pittsburgh, etc., R. Co. v. S. W. Penn. R. Co., 77 Pa. St. 173; Cooley, Const. Lim. 580.

¹¹ Rockford R. Co. v. Hillmer, 72 Ill. 235; Horn v. Chicago, etc., R. Co., 38 Wis. 463.

¹² Galena & C. R. Co. v. Loomis, 13 Ill. 548.

¹³ Wadleigh v. Gilman, 12 Me. 403, 28 Am. Dec. 188; Brady v. Northwestern Ins. Co., 11 Mich. 425.

¹⁴ Foote v. Fire Department, 5 Hill, (N. Y.) 99.

¹⁵ See *People v. Hawley*, 3 Mich. 330.

¹⁶ 116 Mass. 254.

¹⁷ *Ex parte Schrader*, 33 Cal. 279; *Slaughter-House Cases*, 16 Wall. 36; *Crescent City Slaughter-House Co. v. New Orleans*, 33 La. An. 934; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 4 Sup. Ct. Rep. 652.

¹⁸ *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257; *Powell v. Comm.*, 114 Pa. St. 265, 7 Atl. Rep. 913; *In re Brosnahan*, 18 Fed. Rep. 62; *State v. Addington*, 77 Mo. 110; *Northwestern Manuf. Co. v. Wayne Circuit Judge*, 58

assume to be the guardian of morals, it cannot be doubted that it has the power to enact measures calculated for the repression of such forms of vice as threaten its welfare by generating disease, pauperism, and crime. This is signally true of the unrestricted traffic in intoxicating liquors, and of the offenses of maintaining brothels, publishing or selling obscene books or prints, keeping gaming tables, and the like.¹⁹ To this head also we must refer the laws for the suppression of lotteries. Thus, in a leading case it was declared that lotteries were undeniably proper subjects for the exercise of the police power; that a legislature could not, by chartering a lottery company, defeat the will of the people, expressed authoritatively, in relation to the further continuance of such business in their midst; that no legislature could bargain away the public morals; that the right to suppress lotteries was governmental, to be exercised at all times by those in power, at their discretion; and that, therefore, any one who accepted a lottery charter did so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, might resume it at any time when the public good should require, whether it had been paid for or not.²⁰

§ 27. Police Power Limited by the Federal Constitution.

In the nice adjustment of rights and powers between the states and the Union, questions frequently arise which require a determination of the relative scope of the police power of a state and the authority vested in congress. In such cases, the integrity of each must be preserved, without encroachment upon the other. On the one hand, the jurisdiction secured to the general government by the constitution sets a limit to the police power of the states. "The subjects upon which the state may act are almost infinite; yet in its regulations with respect to all of them there is this necessary limita-

Mich. 381, 25 N. W. Rep. 372; *State v. Newton*, (N. J. Sup.) 14 Atl. Rep. 604; *State v. Marshall*, 64 N. H. 549, 15 Atl. Rep. 210; *People v. Arensberg*, 105 N. Y. 123, 11 N. E. Rep. 277; *People v. Marx*, 99 N. Y. 377, 2 N. E. Rep. 29;

Butler v. Chambers, 36 Minn. 69, 30 N. W. Rep. 308; *McAllister v. State*, (Md.) 20 Atl. Rep. 143; *Pierce v. State*, 63 Md. 596; *Palmer v. State*, 39 Ohio St. 236.

¹⁹ *Cooley*, Const. Lim. 596.

²⁰ *Stone v. Mississippi*, 101 U. S. 814.

tion, that the state does not thereby encroach upon the free exercise of the power vested in congress by the constitution.”²¹ But yet, by justly estimating and defining both powers, any real conflict may be avoided. “If the police power extends only to a just regulation of rights with a view to the due protection and enjoyment of all, and does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the state, and its exercise for the regulation of the property and actions of its citizens, cannot well constitute an invasion of national jurisdiction, or afford a basis for an appeal to the protection of the national authorities.”²² Thus the United States supreme court has expressly declared that neither the fourteenth amendment—broad and comprehensive as it is—nor any other of the amendments to the constitution, was designed to interfere with the police power of the states.²³ And the same tribunal, admitting that a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the federal constitution, concedes that “all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained, and consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive.”²⁴

§ 28. Laws Impairing the Obligation of Contracts.

In several instances, police regulations have been assailed in respect to their validity, on the ground that they were repugnant to that clause of the federal constitution which prohibits the states from passing “laws impairing the obligation of contracts.” But it has always been held that the police power, as an inalienable attribute of sovereignty, can never be curtailed or diminished; that it is present, by implication, in every act of legislation; and that no

²¹ *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 359, 7 Sup. Ct. Rep. 1126; *New Orleans Gas-Light Co. v. Louisiana Light Co.*, 115 U. S. 650, 661, 6 Sup. Ct. Rep. 252.

²² *Cooley*, Const. Lim. 574.

²³ *Barbier v. Connolly*, 113 U. S. 24, 5 Sup. Ct. Rep. 357.

²⁴ *City of New York v. Miln*, 11 Pet. 102, 139.

legislature can either surrender or sell it, or destroy or hamper the power of its successors to make such enactments as they may deem proper in matters of public police. From this it follows that if an irrevocable grant of franchises or any contract made by the legislature with an individual or corporation specifies or implies a relinquishment of the police power of the state, it is to that extent invalid, the legislature having exceeded the authority delegated to it by the people. In other words, the exercise by the state, at any time, of its right to legislate for the protection and good government of the community can never be construed into a violation of the prohibition in question, notwithstanding its effect may be to repeal existing charters, or otherwise invade the terms of legislative engagements.²⁵ One of the most important cases in which these doctrines have been maintained was that of the *Beer Co. v. Massachusetts*.²⁶ The question at issue was whether the charter of a private corporation, authorizing it to engage in the manufacture of malt liquors, and, as incidental thereto, to dispose of the product, constituted a contract protected against subsequent legislation prohibiting the manufacture of liquors within the state. The beer company claimed the right, under its charter, to manufacture and sell beer without limit as to time, and without reference to any exigencies in the health or morals of the community requiring such manufacture to cease. It was decided that while the company acquired, by its charter, the capacity, as a corporation, to engage in the manufacture of malt liquors, its business was at all times subject to the same governmental control as like business conducted by individuals; and that the legislature could not divest itself of the power, by such appropriate means, applicable alike to corporations and individuals, as its discretion might devise, to protect the lives, health and property of the people, or to preserve good order and the public morals. The prohibitory enactment of which the beer company

²⁵ *Stone v. Mississippi*, 101 U. S. 814; *Boyd v. Alabama*, 94 U. S. 645; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746. 4 Sup. Ct. Rep. 652; *State v. Paul*, 5 R. I. 185; *People v. Hawley*, 3 Mich. 330; *Reynolds v. Geary*, 26

Conn. 179; *Santo v. State*, 2 Iowa, 165; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *Cooley*, Const. Lim. 574; *Black*, Const. Prohib. § 61.

²⁶ 97 U. S. 25.

complained was held to be a mere police regulation, which the state could establish even had there been no reservation of authority to amend or repeal its charter.

§ 29. Regulation of Commerce.

The "commerce clause" of the federal constitution has been frequently before the courts for construction and interpretation. In connection with the police power of the states, the question of its application has been important chiefly in relation to the state laws on the subjects of navigation, quarantine, immigration, and the like,²⁷ to the question of taxing business or products from without the state,²⁸ and to the laws regulating the manufacture, transportation, and sale of intoxicants. For our present purpose it is sufficient to point out that the power of congress to regulate foreign and interstate commerce and the power of a state to enact police regulations are co-ordinate powers. Each must be preserved in its integrity, but neither must encroach upon the other. The state laws cannot operate upon an article of foreign commerce while it continues such, but neither can this exemption follow the article into the general mass of property in the state.²⁹ The constitutionality of the state excise laws, in their

²⁷ See *Chy Lung v. Freeman*, 92 U. S. 275.

²⁸ See *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. Rep. 454.

²⁹ In the *License Cases*, 5 How. 504, 592, McLean, J., said: "The police power of a state and the foreign commercial power of congress must stand together. Neither of them can be so exercised as materially to affect the other. The sources and objects of these powers are exclusive, distinct, and independent, and are essential to both governments. The one operates upon our foreign intercourse, the other upon the internal concerns of a state. The former ceases when the foreign product becomes commingled with the other property in the state. At this point the local law attaches, and regulates it as it does other

property. The state cannot, with a view to encourage its local manufactures, prohibit the use of foreign articles, or impose such a regulation as shall in effect be a prohibition. But it may tax such property as it taxes other and similar articles in the state, either specifically or in the form of a license to sell. A license may be required to sell foreign articles when those of a domestic manufacture are sold without one. And if the foreign article be injurious to the health or morals of the community, a state may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it. No one doubts this in relation to infected goods or licentious publications. Such a regulation must be made in

relation to importations of liquor from abroad and to the transportation of intoxicants from one state into another for purposes of sale and consumption in the latter jurisdiction, is a subject which we reserve for full discussion in a later chapter of this work.

§ 30. Rights of Citizens of Other States.

There is another constitutional provision which operates, in some cases, as a limitation upon the police power of the states, namely, that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states,"³⁰ together with the cognate prohibition, in the fourteenth amendment, against the making or enforcement of "any law which shall abridge the privileges or immunities of citizens of the United States." We may illustrate the necessary adjustment of the police power to these guaranties of the rights of citizenship by a reference to the decisions which hold that a state cannot impose, for the privilege of doing business within its limits, a heavier license tax upon non-residents than is required of its own citizens.³¹ So, also, a state tax which necessarily discriminates in favor of the products and manufactures of the taxing state and against the introduction and sale of goods produced or manufactured in other states, is within the constitutional inhibition and void.³² But on the other hand, a state law requiring sellers of intox-

good faith, and have for its sole object the preservation of the health or morals of society. If a foreign spirit should be imported containing deleterious ingredients, fatal to the health of those who use it, its sale may be prohibited. When, in the appropriate exercise of these federal and state powers, contingently and incidentally their lines of action run into each other, if the state power be necessary to the preservation of the morals, the health, or safety of the community, it must be maintained. But this exigency is not to be founded on any notions of commercial policy, or sustained by a course of reasoning about that which may be supposed to affect, in some degree, the public wel-

fare. The import must be of such a character as to produce, by its admission or use, a great physical or moral evil. Any diminution of the revenue arising from this exercise of local power would be more than repaid by the beneficial results. By preserving, as far as possible, the health, the safety, and the moral energies of society, its prosperity is advanced." And see *Brown v. Maryland*, 12 Wheat. 419.

³⁰ Const. U. S., art. 4, § 2.

³¹ *Ward v. Maryland*, 12 Wall. 418; *State v. North*, 27 Mo. 464; *Crow v. State*, 14 Mo. 237; *Gould v. Atlanta*, 55 Ga. 678.

³² *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. Rep. 454; *Webber v. Vir-*

icating liquor to take out a license is not invalid, as in conflict with the constitutional provisions above recited, although it excludes non-residents from the privilege of obtaining a license, by limiting it to certain classes of its own citizens, or by requiring a certain term of residence within the state as one of the necessary qualifications of the applicant; for the purpose and effect of such a law is to erect a safeguard against the unlawful selling of liquors, and not to discriminate against citizens of other states.³³

§ 31. Application of the Police Power to the Liquor Traffic.

That the regulation of the manufacture and sale of intoxicating liquors is a proper subject for the exercise of the police power, is a proposition which has never for a moment been doubted. On all the grounds which are recognized as most safely and surely bringing a matter within the scope of this power, the production and selling of intoxicants is included within the sphere of its legitimate operations. For an unregulated and unrestricted traffic in liquor, it is admitted, threatens the public safety by generating vice and crime, imperils the peace and order of the community by the demoralization of its victims, and poisons the fountains of the public prosperity by its contributions of pauperism and squalor. "It is not necessary," says Mr. Justice Grier, "for the sake of justifying the state legislation now under consideration, to array the appalling statistics of misery, pauperism, and crime, which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the states, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority."³⁴ In fact, as remarked by another learned judge, "the power is signally exercised in legislation designed to diminish and prevent the demoralization and impoverishment, and

ginia, 103 U. S. 344; *Welton v. Missouri*, 91 U. S. 275.

³³ *Austin v. State*, 10 Mo. 591; *Kohn v. Melcher*, 29 Fed. Rep. 433; *Trageser v. Gray*, (Md.) 20 Atl. Rep. 905; *Welsh*

v. State, 126 Ind. 71, 25 N. E. Rep. 883; *Mette v. McGuckin*, 18 Nebr. 323, 25 N. W. Rep. 333.

³⁴ *License Cases*, 5 How. 504.

the numberless vices and miseries, which are the sure concomitants and consequences of a free traffic in intoxicating liquors, by restraining or prohibiting it."³⁵

§ 32. Police Power Distinguished from Eminent Domain.

There is a broad distinction between the taking of private property for a public use, under the power of eminent domain, and the incidental injury or inconvenience, or damage or deterioration, which may result to property or business on account of the exertion of the police power of the state, when its purpose is the promotion of the public welfare. In the former case, compensation must be made to the owner; in the latter, no such obligation arises.³⁶ All rights of property are subject to the paramount authority of the state to prohibit any use which may be deemed detrimental to the public health, safety, or morals. "Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so far as to entitle the owner to compensation. If the owner of a vacant lot in the midst of a city could erect thereon a great wooden building and cover it with shingles, he might obtain a larger profit of his land than if obliged to build of stone or brick with a slated roof. If the owner of a warehouse in a cluster of other buildings could store quantities of gunpowder in it for himself and others, he might be saved the great expense of transportation. If a landlord could let his building for a smallpox hospital, or a slaughter-house, he might obtain an increased rent. But he is restrained; not because the public have occasion to make the like use, or to make any use, of the property, or to take any benefit or profit to themselves from it, but because it would be a noxious use, contrary to the maxim *sic utere tuo ut alienum non lædas*. It is not an appropriation of the property to a public

³⁵ State v. Fitzpatrick, 16 R. I. 54, 11 Atl. Rep. 767.

³⁶ Moore v. Indianapolis, 120 Ind. 483, 22 N. E. Rep. 424; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Beer Co. v.

Massachusetts, 97 U. S. 25; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273; Bancroft v. Cambridge, 122 Mass. 438.

use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain. The distinction, we think, is manifest in principle, although the facts and circumstances of different cases are so various that it is often difficult to decide whether a particular exercise of legislation is properly attributable to the one or the other of these two acknowledged powers.”³⁷ At the same time, in the interests of the individual, the exercise of the police power, in this respect, is to be closely watched and confined to its proper limits, lest it overstep the bounds of necessary protection to the public and bring about an unlawful confiscation of property. “The moment the legislature passes beyond mere regulation, and attempts to deprive the individual of his property, or of some substantial interest therein, under pretense of regulation, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power.”³⁸ Thus, when, in the exercise of the police power, private property, or private or vested rights, must be taken for public use, in order to carry out, or to allow to be carried out, improvements or regulations, or to carry on business or occupations, or schemes of public works, looking to the amelioration and benefit of the public health or morals, such private property or private rights of property must be entitled to the protection of the federal and state constitutions, declaring that the same shall not be taken for public use without just compensation.³⁹

³⁷ *Comm. v. Alger*, 7 Cush. 53, 86, per Shaw, C. J. And see *Philadelphia v. Scott*, 81 Pa. St. 80.

³⁸ *Lewis*, Em. Dom. § 6.

³⁹ *New Orleans Water-Works Co. v. St. Tammany Water-Works Co.*, 14 Fed. Rep. 194; affirmed, 120 U. S. 64, 7 Sup. Ct. Rep. 405.

CHAPTER III.

CONSTITUTIONALITY OF LIQUOR LAWS.

- § 33. Restrictive Liquor Laws are Referable to Police Power.
- 34. Power of States to Control Liquor Traffic.
- 35. Powers of Congress in this Regard.
- 36. Power of States Limited by Federal Constitution.
- 37. Power to Prohibit Manufacture and Sale.
- 38. Property in Liquors.
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- 43. Power to Define Intoxicating Liquors.
- 44. Discrimination against Products of Other States.
- 45. Constitutionality of Local Option Laws.
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- 47. Same; Requiring Assent of Neighbors.
- 48. Same; Discrimination against Non-Residents.
- 49. Same; Restriction to Particular Classes.
- 50. Same; Regulation of Sales by Licensees.
- 51. Same; Providing for Revocation of License.
- 52. Constitutionality of Search and Seizure Laws.
- 53. Power to Confiscate Liquor Illegally Kept.
- 54. Power to Authorize Abatement of Liquor Nuisances.
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- 56. Constitutionality of Civil Damage Laws.
- 57. Laws Prohibiting Recovery for Liquor Sold.
- 58. Power of State to Punish Illicit Traffic Criminally.
- 59. Power to Exact Penalties and Forfeitures.
- 60. Laws Relating to Rules of Evidence.
- 61. Laws Relating to Criminal Pleading.
- 62. Constitutional Right of Trial by Jury.
- 63. Measure of Punishment to be Inflicted.
- 64. Title and Subject-Matter of Laws.
- 65. Constitutional Provisions as to Enactment of Laws.

§ 33. Restrictive Liquor Laws are Referable to Police Power.

It has been already stated that the laws of the various states designed to suppress, or to regulate, the manufacture and sale of intox-

icating liquors within their borders are enacted in virtue of their police power; and that whenever the constitutionality of such statutes has been asserted by the courts, it has been in view of the fact that the traffic in intoxicants is a subject clearly and certainly within the scope of this power.¹ "If it be once granted," says the supreme court of Vermont, "that the use of intoxicating liquors as a drink is worse than useless, and intemperance a legitimate consequence of such use, and that intemperance is an evil, injurious to health and sound morals and productive of pauperism and crime, it seems to us that a law designed to prevent such consequences must clearly fall within the class of laws denominated police regulations."² "It is a bold assertion," declares the court in New York, "at this day, that there is anything in the state or United States constitutions conflicting with or setting bounds upon the legislative discretion or action, in directing how, when, and where a trade shall be conducted in articles intimately connected with the public morals, or public safety, or public prosperity, or, indeed, to prohibit and suppress such traffic altogether, if deemed essential to effect those great ends of good government."³

§ 34. Power of States to Control Liquor Traffic.

The general principle that the several states, subject to the paramount authority of the federal constitution and to any limitations to be found in their own constitutions, have full power to enact any and all laws for the suppression of intemperance and for regulating the traffic in liquors, is no longer open to question. "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state."⁴ Restraints upon the traffic in spirituous liquors are not like such as restrict the

¹ *Supra*, § 24.

² *Lincoln v. Smith*, 27 Vt. 328, 337.
And see *State v. Gurney*, 37 Me. 156, 58
Am. Dec. 782.

³ *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657, 666.

⁴ *Beer Co. v. Massachusetts*, 97 U. S. 25.

ordinary avocations of life which advance human happiness, or trade and commerce that produce neither immorality, suffering, nor want. The business is, on principle, within the police power of the state, and restrictions may rightfully be imposed upon it which might be obnoxious, as an illegal restraint of trade, if applied to other pursuits.⁵ It would be easy to multiply authorities in support of the positions here assumed. But the question can seldom arise, if ever, at the present day, in this elementary form. And we shall therefore be content to take up the various kinds of laws relating to this subject-matter, in their order, and examine the objections which have been made to their constitutionality.

§ 35. Powers of Congress in this Regard.

The regulation of the traffic in intoxicants being a matter peculiarly within the police power of the individual states, their action upon this subject, if not in contravention of the federal constitution, is beyond either the control or interference of the general government. Congress and the federal courts may indeed take proper measures to secure the citizens of the United States in the enjoyment of their rights. But the right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States, which, by the fourteenth amendment, the states were forbidden to abridge; and when a state authorizes, or refuses to authorize, the sale of liquor on such terms as it thinks proper, the courts of the United States have nothing to do with the exercise of its police power in this regard.⁶ Congress, however, has undoubtedly the power to pass a law imposing a license duty on those who are engaged in a business which is a subject of police regulation by the states.⁷ And in the exercise of the powers conferred upon it by the constitution, the same body may rightfully enact laws, in the nature of police regulations, to have effect within the domains, or upon the persons,

⁵ Schwuchow v. Chicago, 68 Ill. 444.

Wagner, 68 Iowa, 660, 27 N. W. Rep.

⁶ *In re Hoover*, 30 Fed. Rep. 51; *Edgar v. State*, 45 Ark. 356; *Lemon v.*

814.

⁷ *United States v. Riley*, 5 Blatchf. 204.

subject to its proper jurisdiction. Thus, as congress has power to regulate commerce "with the Indian tribes," it is held that it has also power to regulate commerce *between* the Indian tribes and the members thereof, and hence it may prohibit the traffic in spirituous liquors between such tribes or members, within as well as without the limits of a state.⁸ So also congress has power to enact that intoxicating liquors shall not be manufactured or sold as a beverage in Alaska, and to authorize the President of the United States to make such regulations as may be necessary to carry out the provisions of the law.⁹ So again, the provision of the fifth amendment to the federal constitution that "no person shall . . . be deprived of life, liberty, or property without due process of law," does not prohibit congress from exercising police power in those places where it has exclusive jurisdiction, by local option laws.¹⁰

§ 36. Power of States Limited by Federal Constitution.

The validity of every act of state legislation is subject to the condition that it must not be repugnant to the constitution of the United States. And this is just as true of laws enacted in virtue of the police power as of any others. Great and salutary as this power is, there is nothing in its nature or objects which enables it to override the supreme law of the land. This will fully appear in our subsequent discussion of the several varieties of liquor laws. But at present it is pertinent to adduce some illustrations of the possible conflict of such laws with the authority of the constitution, and of the manner in which such antagonism may be avoided. Under that instrument, no state may pass any law impairing the obligation of contracts. And it is settled law that the charter of a private corporation, containing a grant of powers and privileges, is a contract within the meaning of this clause. Yet corporations are not exempt from the police control of the state. The power to enact such regu-

⁸ United States v. Shaw-Mux, 2 Sawy. 364.

⁹ United States v. Nelson, 29 Fed. Rep. 202. (Dist. Ct. Alaska.) This case was carried by writ of error to the cir-

cuit court for the District of Oregon, and there affirmed by Deady, J. Nelson v. United States, 30 Fed. Rep. 112.

¹⁰ Territory v. O'Connor, 5 Dak. 397, 41 N. W. Rep. 746.

lations is an inalienable power; no legislature can grant or bargain it away; it is not passed away by any contract of the state; a contract having the apparent effect to divest succeeding legislatures of this power would be, to that extent, invalid. And it follows that if any corporation is affected in respect to its powers, franchises, or property, by a police regulation afterwards enacted,—*e. g.*, a prohibitory liquor law,—no contract obligation is impaired, but the law is valid.¹¹

Again, no state may “levy any imposts or duties on imports or exports.” But the word “imports,” as here used, does not refer to articles imported from one state into another, but only to articles imported from abroad. Hence a uniform tax imposed by a state upon all sales made within it, whether they be made by a citizen of it or by a citizen of another state, and whether the goods sold are the produce of the state enacting the law or of another state, is valid.¹²

The fourteenth amendment forbids the states to make or enforce any law which shall “abridge the privileges or immunities of citizens of the United States.” But the right to sell intoxicating liquors is not one of the privileges or immunities here contemplated.¹³ But on the other hand, any state legislation which in effect discriminates against the products of other states, though its design may be the furtherance of an object properly within the police power, is an infringement of the exclusive power of congress to regulate interstate commerce and therefore invalid.¹⁴ So a statute which forbids common carriers to bring any intoxicating liquors into the state from any other state or territory, without first procuring a certificate from the county auditor that the consignee is authorized to sell such liquors in the county, is an unconstitutional attempt to regulate commerce.¹⁵ But

¹¹ *Beer Co. v. Massachusetts*, 97 U. S. 25, s. c. 115 Mass. 153; *Stone v. Mississippi*, 101 U. S. 814; *Boyd v. Alabama*, 94 U. S. 645; *Black, Const. Prohib.* §§ 61-65.

¹² *Hinson v. Lott*, 8 Wall. 148.

¹³ *In re Hoover*, 30 Fed. Rep. 51; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357.

¹⁴ *Welton v. Missouri*, 91 U. S. 275; *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. Rep. 454; *State v. Brennan*, (S. Dak.) 50 N. W. Rep. 625. The subject of liquor laws in connection with the regulation of commerce is fully discussed in §§ 66-79, *infra*.

¹⁵ *Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 869.

not so an act which makes it unlawful to solicit or take orders for liquors in the state to be delivered without the state, if the salesman has reason to believe the liquors are intended for illegal sale.¹⁶

§ 37. Power to Prohibit Manufacture and Sale.

It is within the power of a state to absolutely *prohibit* the manufacture and sale, within its borders, of intoxicating liquors, either by statute or constitutional enactment, and such prohibition is a lawful exercise of its police power and is not open to objection on constitutional grounds.¹⁷ Such a law, in so far as it prohibits the sale of liquors in existence at the time of its passage, is not an *ex post facto* law, since, if it lessens the value of such liquors, such civil consequence does not make it retroact criminally in such sense as to bring it within the definition of an *ex post facto* law.¹⁸ Neither can it be considered as impairing the obligation of contracts, though it may affect corporations or others possessing the right, by legislative grant, at the time of its enactment, to manufacture or sell such liquors.¹⁹ And although it may deprive persons of the right to pursue a business previously lawful, and may have the effect of diminishing the value of property owned by them and specially adapted to the contin-

¹⁶ Lang v. Lynch, 38 Fed. Rep. 489.

¹⁷ See fully, *infra*, §§ 81-87. And see Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273; Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. Rep. 6; Foster v. Kansas, 112 U. S. 201, 5 Sup. Ct. Rep. 8, 97; Beer Co. v. Massachusetts, 97 U. S. 25; License Cases, 5 How. 504; Bartemeyer v. Iowa, 18 Wall. 129; State v. Bradley, 26 Fed. Rep. 289; *In re Brosnahan*, 18 Fed. Rep. 62; Tanner v. Alliance, 29 Fed. Rep. 196; Weil v. Calhoun, 25 Fed. Rep. 865; Kessinger v. Hinkhouse, 27 Fed. Rep. 883; State v. Wheeler, 25 Conn. 290; State v. Fitzpatrick, 16 R. I. 54, 11 Atl. Rep. 737; People v. Quant, 2 Park. (N. Y.) 410; Metropolitan Board of Excise v. Barrie, 34 N. Y. 657; Savage v. Comm., 84 Va. 582, 5 S. E. Rep. 565; Stickrod v. Comm., 86 Ky. 285, 5

S. W. Rep. 580; State v. Mugler, 29 Kans. 252, 44 Am. Rep. 634; Prohibitory Amendment Cases, 24 Kans. 700; Jones v. People, 14 Ill. 196; Santo v. State, 2 Iowa. 165, 63 Am. Dec. 487; Drake v. Jordan, 73 Iowa. 707, 36 N. W. Rep. 653; Drake v. Kaiser, 73 Iowa. 703, 36 N. W. Rep. 652; Kaufman v. Dostal, 73 Iowa, 691, 36 N. W. Rep. 643; McLane v. Leicht, 69 Iowa, 401, 29 N. W. Rep. 327; Craig v. Florange, 71 Iowa. 761, 32 N. W. Rep. 356; People v. Hawley, 8 Mich. 330; People v. Gallagher, 4 Mich. 244; Moore v. Indianapolis, 120 Ind. 483, 22 N. E. Rep. 424.

¹⁸ State v. Paul, 5 R. I. 185; State v. Keeran, Id. 497.

¹⁹ Beer Co. v. Massachusetts, 97 U. S. 25; State v. Paul, 5 R. I. 185.

uance of the business, it does not, for that reason, amount to a deprivation of their property or liberty without due process of law, within the meaning of the constitution.²⁰ Neither does it violate the privileges or immunities secured to citizens of the United States by the fourteenth amendment.²¹ Nor, if confined to persons and property fully within the jurisdiction of the state, is it invalid as a regulation of foreign or interstate commerce.²²

§ 38. Property in Liquors.

Property in an article is the right to have and use it subject to law. The right to sell it is not an essential ingredient that may not be separated from the ownership. Hence a law regulating or prohibiting the sale of any article deemed injurious to the public, as intoxicating liquor, does not take away any vested right of property.²³ "It has been said," observes the supreme court of Vermont, "that intoxicating liquors are property, and that a law prohibiting their sale as a drink is the exercise of a despotic power, calling for a constitutional interference with the rights of property, and necessarily impairing and even destroying those rights, which, it is claimed, is against natural right and justice and beyond the pale of constitutional authority. It is not to be assumed by us that intoxicating liquors, under the act, are not to be regarded as property, at least in a certain sense. The act does not declare that they are not property, and there is no language which should receive a construction to forbid their being property. Though there is a prohibition, not to sell them, yet that cannot prevent a man from having a property in them

²⁰ *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6; *Moore v. Indianapolis*, 120 Ind. 483, 22 N. E. Rep. 424; *Menken v. City of Atlanta*, 78 Ga. 668, 2 S. E. Rep. 559; *Kaufman v. Dos-tal*, 73 Iowa, 691, 36 N. W. Rep. 693; *Drake v. Kaiser*, 73 Iowa, 703, 36 N. W. Rep. 652; *Tanner v. Alliance*, 29 Fed. Rep. 196. Compare *Wynehamer v. People*, 13 N. Y. 378.

²¹ *Bartemeyer v. Iowa*, 18 Wall. 129, 133.

²² *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6; *Pearson v. International Distillery*, 72 Iowa, 348, 34 N. W. Rep. 1.

²³ *State v. Allmond*, 2 Houst. (Del.) 612; *State v. Wheeler*, 25 Conn. 290; *Oviatt v. Pond*, 29 Conn. 479; *State v. Paul*, 5 R. I. 185; *Lincoln v. Smith*, 27 Vt. 328; *Preston v. Drew*, 33 Me. 558, 54 Am. Dec. 639.

for his own use, without any intention to sell them; and they may be transported through the state, where there is no intention to violate the law; and indeed the act itself, authorizing the town agents to sell them for certain specified purposes, thereby admits them to be property for such purposes."²⁴ But it is justly held that a provision in such a law that no person, without a state license, shall "keep in his possession, for another, spirituous liquors," is unconstitutional and void. "The keeping of liquors in his possession by a person, whether for himself or for another, unless he does so for the illegal sale of it, or for some other improper purpose, can by no possibility injure or affect the health, morals, or safety of the public, and therefore the statute prohibiting such keeping in possession is not a legitimate exertion of the police power. It is an abridgment of the privileges and immunities of the citizen without any legal justification, and therefore void."²⁵

§ 39. Power to Regulate Sale of Liquor.

If the power of the state to *prohibit* the manufacture and sale of intoxicating liquors be conceded,—and it is no longer open to question,—it will follow inevitably that the power of the state to *regulate* the sale of such articles, and to impose conditions and burdens and responsibilities upon those who desire to engage in the traffic, is practically unlimited. This principle, which is recognized by the authorities as a necessary truth,²⁶ will furnish a test for determining

²⁴ Lincoln v. Smith, 27 Vt. 323, 338.

²⁵ State v. Gilman, 33 W. Va. 146, 10 S. E. Rep. 283.

²⁶ State v. Ludington, 33 Wis. 107. We extract the following from the valuable opinion of Chief Justice Dixon in this case: "Assuming the general power of the legislature over the subject, to the extent of prohibiting entirely the traffic in intoxicating liquors or drinks, necessarily involves, as it seems to us, the admission of the utmost limit of legislative discretion in prescribing the conditions of sale, and establishing the liabilities, both civil and criminal, of

persons engaged in the trade, in case the legislature sees fit in any manner or under any circumstances of restriction or responsibility to authorize such sale or trade. The law being prospective only in its operation, the legislative power to prohibit all sales must carry with it, as it seems to us, that of declaring the precise terms and conditions upon which any particular sale may take place. This would seem to be so by the familiar principle upon which the greater is always said to include the less. Possessed of the power of absolute prohibition under the constitution,

the validity of many of the laws which have been enacted by way of restriction upon the liquor traffic, and will show the necessity of pointing to a very clear infraction of some constitutional guaranty, in order successfully to controvert the validity of such a statute. And we may here remark that if the state has power to prohibit the sale of liquor, it has also power to prohibit the *giving* of liquor by one person to another. The evil to be avoided is the communication from one to another of an article which may be injurious to the recipient, or which, by its general use, may demoralize or harm the

it seems to follow that any relaxation from a plenary exercise of such power, or qualified or conditional enactment by the legislature by which license to sell may be obtained in the way and subject to the liabilities imposed by the act, cannot be an encroachment of legislative authority, unless indeed the legislature should transcend some settled principle of fundamental law, respecting the trial or mode of prosecution or punishment of the party charged with an infraction of the provisions of the act, or with having incurred some liability under it. Acting in obedience to those fundamental principles, in accordance with which the guilt or liability of the party charged must first be ascertained and established, and the judgment of the law rendered against him, it seems competent for the legislature to attach such consequences, civil or criminal, to the mere act of sale, as it pleases, even when such sale is made in pursuance of an authority of the legislature, qualifiedly given for that purpose. Empowered to prohibit entirely, the legislature may license *sub modo*, or conditionally only. It may affect the licensee with such restraints, conditions, and responsibilities as it pleases, growing out of the act of sale. It may visit him with such consequences as it sees fit, proceeding from the same act. It may couple the license with conditions so oppressive, burdensome, and unjust that no citizen can afford to apply

for or accept the privilege and engage in the business, and thus the act, though nominally otherwise, may amount to a prohibitory law. These conclusions seem unavoidably to flow from the position, admitted or not denied, that the legislature possesses the unqualified power of prohibition. The legislature may not take away the right of trial by jury, or of proceeding by due process of law to ascertain the fact of violation or of liability incurred. It may not require the accused to plead guilty, to confess judgment, or to give evidence against himself. Neither may it create any arbitrary or violent presumption of guilt upon facts equally or more consistent with innocence. It may not change the rules of evidence, or the burden of proof established according to the principles of the common law, and secured and made perpetual by the constitution, nor destroy vested rights, nor punish one man for the delinquencies or misconduct of another, nor, without his consent, make him answerable in damages for the injurious consequences of the acts of another, in which he had no participation, or with which he was wholly disconnected. These and other like things the legislature may not do; but with respect to the act of sale, over which the power of legislation is conceded to be unlimited, and with respect to the responsibility which shall attach to the doing of that act or the conditions under which it may be done, the

whole community. It is not attempted to restrain a man's private indulgence in drink. But that is because law deals not with the isolated individual, but with men in their relations to each other. Upon the delivery of a noxious substance from one to another, a relation is established of which the law may take cognizance. And it is perfectly immaterial whether the transfer be by sale, barter, or gift. The evil is not in the receipt of money for the article furnished, but in the furnishing of it. And so the authorities hold.²⁷ It is probable that such a law would not be construed to prevent a man from giving liquor to a guest in his own house, purely in the way of hospitality. But that is a question of interpretation, not of the power of the legislature.

§ 40. Prohibition of Sale in Particular Localities.

A statute prohibiting the sale of liquor in certain specified localities is not, for the reason that its application is limited and not general, an unconstitutional law.²⁸ On this principle, the laws, found in many of the states, forbidding such sales within a certain distance of any church, school, university, or other similar institution, are sustained as legitimate exertions of the police power.²⁹ So also an act prohibiting or restricting the sale of intoxicants, which applies only to one or more specified counties, is not invalid, provided it applies equally to all persons within the territorial limits described, so as to

way seems open for the legislature to enact whatsoever it pleases. As already more than once observed, this conclusion seems clearly to result from the unrestricted and arbitrary nature of the discretion vested in the legislature in the exercise of what is termed the police power of the state, which is said to be a right to regulate all such matters found in the first principles of good government and self-protection. The legislature may say to all citizens and persons within the state that they shall not sell, give away, or traffic in it at all as a beverage; or it may say that they

may do so, being responsible for all the injurious consequences of their acts, which consequences are pointed out and defined by previous law."

²⁷ *Powers v. Comm.*, (Ky.) 13 S. W. Rep. 450; *Altenburg v. Comm.*, 126 Pa. St. 602, 17 Atl. Rep. 799.

²⁸ *Howell v. State*, 71 Ga. 224.

²⁹ *State v. Rauscher*, 1 Lea, 96; *State v. Muse*, 4 Dev. & B. Law, 319; *Trammell v. Bradley*, 37 Ark. 374; *Dorman v. State*, 34 Ala. 216; *Whitney v. Township Board*, 71 Mich. 234, 39 N. W. Rep. 40; *State v. Stovall*, 103 N. Car. 416, 8 S. E. Rep. 900.

secure uniformity of operation notwithstanding its local character.³⁰ So a law prohibiting the sale of liquor within two miles of the corporate limits of a municipality is not open to the objection of not being uniform in its operation.³¹ Nor is there any constitutional objection to a law which prohibits the sale of liquor outside of towns and cities, and permits its sale under license within towns and cities; for the legislature may prescribe different police regulations in different localities, provided such laws apply equally to all persons within the territorial limits affected.³²

§ 41. Prohibition of Sale on Particular Days.

It is competent for the state, as a matter of police regulation, to prohibit, under penalties, the sale of liquor by retail on Sundays, as well as on election days or other public days.³³ Such a law, in respect to the prohibition of selling on Sunday, is in no sense an attempt to enforce the observance of that day as a religious institution, and hence is not repugnant to the provisions in the federal and state constitutions forbidding the establishment of any religion.³⁴ It is a matter of notorious fact that ordinary business is habitually suspended on that day, that masses of men are then idle and would be at liberty to frequent the saloon, and that a great portion of the people are in the practice of assembling for religious exercises. For these reasons it is specially important to preserve the good order and tranquillity of the community on that day, and to that end it is specially necessary to suspend the sale of intoxicants. It is clear, therefore, that the prohibition in question is no more than a legitimate police regulation.

³⁰ *McCuen v. State*, 19 Ark. 630; *Creekmore v. Comm.*, (Ky.) 12 S. W. Rep. 628; *State v. Joyner*, 81 N. Car. 534.

³¹ *State v. Schroeder*, 51 Iowa, 197, 1 N. W. Rep. 481.

³² *State v. Berlin*, 21 S. Car. 292, 53

Am. Rep. 677; *United States v. Ronan*, 33 Fed. Rep. 117.

³³ *Thomasson v. State*, 15 Ind. 449.

³⁴ *State v. Bott*, 31 La. Ann. 663, 33 Am. Rep. 224.

§ 42. Prohibition of Sale to Particular Classes of Persons.

Wherever the law allows the sale of liquor under license or other restrictions, there are statutes forbidding such sale to certain classes of persons who are peculiarly liable to be injured or demoralized by indulgence in alcoholic beverages, such as minors, persons already intoxicated, and habitual drunkards. The constitutionality of such laws has seldom been questioned, and indeed their validity could scarcely be assailed with any show of reason. What authority we have is in affirmance of the legislative power to ordain such regulations.³⁵ And it is held that a law against permitting a minor to enter upon and remain in a retail liquor dealer's place of business is valid. It is enacted for the purpose of shielding youth from temptation, and the state has power to enact and enforce such a law even in disregard of the parents' wishes, when its object and tendency is to protect the child.³⁶ So, also, the act of congress prohibiting the sale of ardent spirits to Indians, based upon its power to regulate commerce with the Indian tribes, is valid and constitutional.³⁷

§ 43. Power to Define Intoxicating Liquors.

In Rhode Island, the courts have sustained the constitutionality of a statute restraining the sale of intoxicating liquors, and defining the term to include ale, wine, rum, etc., or any liquors containing more than two per cent., by weight, of alcohol.³⁸ It has occasionally been argued that the legislature has no power to declare that to be intoxicating which is not so; that the use of any beverage which is not capable of producing intoxication can have no possible influence upon the public health, safety, or morals; and that, therefore, if the legislature should attempt to include any such innocent article in its prohibition, the statute would be to that extent in-

³⁵ *Allen v. State*, 52 Ind. 486; *Goldsticker v. Ford*, 62 Tex. 385; *Altenburg v. Comm.*, 126 Pa. St. 602, 17 Atl. Rep. 799.

³⁶ *Goldsticker v. Ford*, 62 Tex. 385.

³⁷ *United States v. Holliday*, 3 Wall. 407.

³⁸ *State v. Guinness*, 16 R. I. 401, 16 Atl. Rep. 910; *State v. Gravelin*, 16 R. I. 407, 16 Atl. Rep. 914.

valid. It is probable that the courts would accede to this reasoning in a very strong case,—a case where there could be no possible doubt as to the innocent nature of the liquor in question. But they are disposed to leave much to the legislative judgment and discretion, and act with caution in taking judicial notice of the properties of such articles. And therefore such a case is not very likely to arise in practice.

§ 44. Discrimination against Products of Other States.

In several of the states, at various times, laws have been enacted prohibiting the sale of wine made from fruits grown outside the particular state, but permitting the sale of that made from fruits grown within the state. And in some few cases provisions of this kind have been held valid.³⁹ But the great preponderance of authority, based upon repeated rulings of the supreme court of the United States, is to the effect that such a discrimination against the products of other states is not defensible as a police regulation, but is unconstitutional and void as an encroachment upon the exclusive power of congress to regulate foreign and interstate commerce.⁴⁰ Such a law "falls within the rule, so often announced by the supreme court, that legislation forbidding the sale of a commodity if of foreign production, but permitting it if of home production, cannot be sustained as a police regulation, but is clearly an attempt to restrict interstate commerce, and to discriminate against the citizens and products of other states."⁴¹ Where a proviso of this sort occurs in the midst of a general restrictive or prohibitory law, the courts will endeavor, if possible, to separate the invalid portion and leave the remainder of the statute in force. This might produce two effects.

³⁹ *State v. Stucker*, 58 Iowa, 496, 12 N. W. Rep. 483; *McGuire v. State*, 42 Ohio St. 530.

⁴⁰ *Tiernan v. Rinker*, 102 U. S. 123; *Welton v. Missouri*, 91 U. S. 275; *Gray v. Baltimore*, 100 U. S. 434; *Hinson v. Lott*, 8 Wall. 148; *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. Rep. 454; *Weil*

v. Calhoun, 25 Fed. Rep. 865; *Kohn v. Melcher*, 29 Fed. Rep. 433; *State v. Nash*, 97 N. Car. 514, 2 S. E. Rep. 645; *Powell v. State*, 69 Ala. 10; *McCreary v. State*, 73 Ala. 480; *State v. Marsh*, 37 Ark. 356; *State v. Deschamp*, 53 Ark. 490, 14 S. W. Rep. 653.

⁴¹ *Kohn v. Melcher*, 29 Fed. Rep. 433.

Either the result might be to subject domestic wines to the prohibition equally with all others, or else to remove any restriction upon the sale of foreign wines except such as may apply equally to those of home production. Which of these consequences will follow the excision of the unconstitutional part, must depend upon the language of the particular statute.⁴²

Very similar to the foregoing is the case of a tax imposed by a state statute upon an occupation, which necessarily discriminates against the introduction and sale of the products of another state, or against the citizens of another state. In the cases in which such statutes have been declared invalid it is laid down that the police power of the state to regulate the sale of intoxicating liquors, and preserve the public health and morals, does not warrant the enactment of laws infringing positive provisions of the federal constitution; and that a statute which imposes a tax upon persons who, not residing or having their principal place of business within the state, engage there in the business of selling or soliciting the sale of intoxicating liquors to be shipped into the state from places without it, but does not impose a similar tax upon persons selling or soliciting the sale of such as are manufactured in the state, is a regulation in restraint of commerce, and repugnant to the constitution of the United States.⁴³ And it makes no difference that the tax is imposed in the form of requiring a license fee. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods. If such a tax is within the power of the state to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but if such tax conflicts with any power constitutionally vested in congress, it will not be any the less invalid because enforced through the form of a license.⁴⁴

⁴² See *State v. Nash*, 97 N. Car. 514, 2 S. E. Rep. 645; *State v. Marsh*, 37 Ark. 356; *Weil v. Calhoun*, 25 Fed. Rep. 865; *Ex parte Kinnebrew*, 35 Fed. Rep. 52.

⁴³ *Walling v. Michigan*, 116 U. S. 446,

6 Sup. Ct. Rep. 454; *Welton v. Missouri*, 91 U. S. 275; *Tiernan v. Rinker*, 102 U. S. 123.

⁴⁴ *Welton v. Missouri*, 91 U. S. 275.

§ 45. Constitutionality of Local Option Laws.

A "local option" law is a law framed for the purpose of prohibiting, or severely restricting, the sale of intoxicating liquors, under penalties, and containing a provision that the several counties, townships, or other divisions of the state, may hold elections to determine by popular vote whether they desire the law to be in force in their limits, and with a further provision that in each case where such election results in favor of the adoption of the law, it shall take effect in the district so voting, but that each district rejecting it shall continue to be governed, in this respect, by the existing laws. Local option laws have been tried in many of the states, at various times, and their validity has been often questioned. In a comparatively small number of decisions (some of which, moreover, have been overruled) they have been declared unconstitutional, on grounds to be hereafter examined.⁴⁵ But the overwhelming preponderance of authority is to the effect that such a statute, if it is a complete enactment in itself, requiring nothing further to give it validity, and depending upon the popular vote for nothing but a determination of the territorial limits of its operation, is a valid and constitutional exertion of the legislative power.⁴⁶ The ground of objection most frequently urged against such laws is that they amount to an unlawful delegation of legislative power to the people. This, however, is based upon a misconception of the legal effect of the popular vote.

⁴⁵ *Parker v. Comm.*, 6 Pa. St. 507, 47 Am. Dec. 480; *Maize v. State*, 4 Ind. 342; *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487; *State v. Weir*, 33 Iowa, 134, 11 Am. Rep. 115; *Morgan v. State*, 81 Ala. 72, 1 South. Rep. 472; *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425; *Turner v. Saxon*, (Wash. T.) 20 Pac. Rep. 685.

⁴⁶ *Weil v. Calhoun*, 25 Fed. Rep. 865; *State v. Parker*, 26 Vt. 357; *Comm. v. Bennett*, 108 Mass. 27, 11 Am. Rep. 304; *Comm. v. Dean*, 110 Mass. 357; *State v. Wilcox*, 42 Conn. 364, 19 Am. Rep. 536; *Gloversville v. Howell*, 70 N. Y. 287; *Locke's Appeal*, 72 Pa. St. 491, 13 Am.

Rep. 716; *State v. Common Pleas of Morris Co.*, 36 N. J. Law, 72, 13 Am. Rep. 422; *State v. Circuit Court*, 50 N. J. Law, 585, 15 Atl. Rep. 272; *Hammond v. Haines*, 25 Md. 541, 90 Am. Dec. 77; *Fell v. State*, 42 Md. 71, 20 Am. Rep. 83; *Slymer v. State*, 62 Md. 240; *Savage v. Comm.*, 84 Va. 619, 5 S. E. Rep. 565; *Caldwell v. Barrett*, 73 Ga. 604; *Schulherr v. Bordeaux*, 64 Miss. 59, 8 South. Rep. 201; *Lemon v. Peyton*, 64 Miss. 161, 8 South. Rep. 235; *Holley v. State*, 14 Tex. App. 505; *Ex parte Lynn*, 19 Tex. App. 293; *Anderson v. Comm.*, 13 Bush, 485; *Comm. v. Weller*, 14 Bush, 218, 29

If the law is complete in itself, it is the legislature which enacts it, not the people, although the people are permitted to determine the contingency on which its going into effect in a particular locality may depend. To make this more plain, we add extracts from a few of the best considered decisions on this point. The court in New Jersey, speaking of a local option law, observes: "It left to the popular vote to determine, not whether it should be lawful to sell without license, but whether the contingency should arise under which license might be granted. It was not submitted to the voters of Chatham to say whether there should be a majority vote in favor of license before license could be granted; the law as framed declares that there shall be such majority vote. . . . It is the law which makes the majority vote necessary, and not the voice of the people. Whether the vote is aye or no, the law is at all times the same, and requires the majority vote as a condition precedent to the granting of license."⁴⁷ So in Missouri, it is said: "It was the law that authorized the vote to be taken, and when taken, the law, and not the vote, declared the result that should follow the vote. The vote was the means provided to ascertain the will of the people, not as to the passage of the law, but whether intoxicating liquor should be sold in their midst. If the majority voted against the sale, the law, and not the vote, declared that it should not be sold. The vote sprang from the law, and not the law from the vote. By their vote the electors declared no consequences, prescribed no penalties, and exercised no legislative function. The law declared the consequences, and whatever they may be, they are exclusively the result of the legislative will."⁴⁸ To the same effect is the reasoning of the supreme court of Pennsylvania, where it says: "Then what did the vote decide? Clearly not that the act should be a law or should not be, for the law already existed. Indeed it was not delegated to the peo-

Am. Rep. 407; *Boyd v. Bryant*, 35 Ark. 69, 37 Am. Rep. 6; *Gordon v. State*, 46 Ohio St. 607, 23 N. E. Rep. 63; *State v. Pond*, 93 Mo. 606, 6 S. W. Rep. 469; *Feek v. Bloomington*, 82 Mich. 393, 47 N. W. Rep. 37; *Territory v. O'Connor*, 5 Dak. 397, 41 N. W. Rep. 746; *State v. Cooke*,

24 Minn. 247, 31 Am. Rep. 344; *Cooley*, Const. Lim. 125.

⁴⁷ *State v. Common Pleas of Morris Co.*, 36 N. J. Law, 72.

⁴⁸ *State v. Pond*, 93 Mo. 606, 6 S. W. Rep. 469.

ple to *decide* anything. They simply declared their views or wishes, and when they did so, it was the *fiat* of the law, not their vote, which commanded licenses to be issued or not to be issued. . . . The true distinction, I conceive, is this: The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.”⁴⁹ But the law, to escape the charge of unconstitutionally delegating legislative power, must be a complete and perfect enactment as it leaves the hands of the legislature. It must not depend upon the expression of the popular will in respect either to its validity or its terms. Certainly the law-making body would have no power to authorize the people of a district to decide *what kind* of a liquor law they will have. Nothing can be referred to the voters but the question whether they will adopt the particular law which the legislature enacts.⁵⁰

The validity of local option laws has also been questioned on the ground that they may result in a diversity of laws in different parts of the same state, whereas uniformity should be the rule, and that they are local or special in their nature. But it is held that such a law, if the same question is submitted in the same way to all the counties or other divisions of the state, is not obnoxious to a constitutional provision that “no local or special law shall be passed when a general law can be made applicable.”⁵¹ Nor is it in violation of a constitutional requirement that all laws of a general nature shall have a uniform operation throughout the state. “Uniformity in its operation is not destroyed because the electors in one or more townships may not see fit to avail themselves of its provisions.”⁵² Neither is such a law in contravention of a constitutional provision that “the legislature shall not pass private, local, or special laws regulating the internal affairs of towns and counties.” For this inhibition is not intended to secure uniformity in the exercise of delegated police powers, but to forbid laws vesting in one town or county a power of local

⁴⁹Locke's Appeal, 72 Pa. St. 491, 13 Am. Rep. 716.

⁵⁰See Rice v. Foster, 4 Harr. (Del.) 479; Geebrick v. State, 5 Iowa, 491.

⁵¹State v. Pond, 93 Mo. 606, 6 S. W.

Rep. 469; *Ex parte* Swann, 96 Mo. 44, 9 S. W. Rep. 10.

⁵²Gordon v. State, 46 Ohio St. 607, 23 N. E. Rep. 63.

government not granted to another.⁵³ And in the absence of any such constitutional restraint, it is said that there is no great underlying principle of natural right and justice which forbids the legislature to enact laws for a particular locality different from those applicable to other portions of the state, or which prohibits it from suspending the operation of general laws as to any particular locality; hence a local option law cannot be declared invalid on any such ground; on the contrary, it is in furtherance of the right of local self-government.⁵⁴

The courts have further held that local option laws cannot be adjudged unconstitutional on the ground of their taking private property for public use, or depriving persons of their property without due process of law, or impairing the obligation of contracts or destroying vested rights.⁵⁵ As local option is really a species of prohibition, applied to the localities adopting it, this question is involved in the question of the validity of general prohibitory laws, and must be regarded as settled by the decisions sustaining such enactments. And although the local option law may be adopted in some parts of the state and rejected in others, with the result that different penalties for the same act are in force in different districts, yet, if the act applies alike to all persons within a locality where it is adopted, it cannot be said to "deny to any person the equal protection of the laws."⁵⁶ Neither does such a law abridge the privileges and immunities of the citizen, as the sale of liquor is not a right of that class.⁵⁷ Nor is it repugnant to or inconsistent with the laws of the United States, although it may prevent a person from reaping the benefit of a license issued under the internal revenue acts; because such license is merely a receipt for taxes, implying nothing except that the licensee, having paid such taxes, shall be subject to no penalty

⁵³ *State v. Circuit Court*, 50 N. J. Law. 585, 15 Atl. Rep. 272.

⁵⁴ *Feek v. Bloomingdale*, 82 Mich. 393, 47 N. W. Rep. 37.

⁵⁵ *Ex parte Lynn*, 19 Tex. App. 293; *Steele v. State*, Id. 425; *Ex parte Kennedy*, 23 Tex. App. 77, 8 S. W. Rep. 114; *Savage v. Comm.*, 84 Va. 619, 5 S.

E. Rep. 565; *McKinney v. Salem*, 77 Ind. 213; *Menken v. City of Atlanta*, 78 Ga. 668, 2 S. E. Rep. 559.

⁵⁶ *Ex parte Swann*, 96 Mo. 44, 9 S. W. Rep. 10.

⁵⁷ *Ex parte Burnside*, 86 Ky. 423, 6 S. W. Rep. 276.

under federal law.⁵⁸ It is also ruled that there is nothing in the constitution or form of government of a territory, or in the laws of the United States, to prevent it from enacting a local option law in the exercise of its police power.⁵⁹ Finally, if the legislature has power to pass a local option law, it has also power to provide that any district adopting the law shall not undo its action in that regard within two years.⁶⁰

§ 46. Constitutionality of License Laws.

In the exercise of its undoubted power to regulate the traffic in intoxicating liquors, the legislature of a state may lawfully provide a system for the granting of licenses to sell at retail, and may impose such restrictions and conditions upon the granting of such licenses, and as to the qualifications necessary to secure them, and may provide such causes for the forfeiture and revocation of licenses, as it may deem necessary and proper.⁶¹ "If the state has power to prohibit, it certainly has the power to regulate the traffic by determining who, and what character of persons, shall be licensed to deal in the article . . . Having full and complete control over the subject, as an article of internal commerce, the state can prescribe what conditions it may think proper upon which licenses can be obtained. It becomes simply a question of degree of prohibition."⁶² Under the license laws as generally framed, it is not every person who chooses that can obtain a license. The applicant is usually required to be a resident of the state, of good moral character, recommended by a

⁵⁸ *Territory v. O'Connor*, 5 Dak. 397, 41 N. W. Rep. 746.

⁵⁹ *Territory v. O'Connor*, 5 Dak. 397, 41 N. W. Rep. 746. Compare *Thornton v. Territory*, 3 Wash. T. 482, 17 Pac. Rep. 896.

⁶⁰ *Feek v. Bloomingdale*, 82 Mich. 393, 47 N. W. Rep. 37.

⁶¹ *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. Rep. 13; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *People v. Meyers*, 95 N. Y. 223; *Ingersoll v. Skinner*, 1 Denio, 540; *Pierce v.*

State, 13 N. H. 536; *Keller v. State*, 11 Md. 520, 69 Am. Dec. 226; *Cahen v. Jarrett*, 42 Md. 571; *Rohrbacher v. Jackson*, 51 Miss. 735; *Schulherr v. Bordeaux*, 64 Miss. 59, 8 South. Rep. 201; *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N. E. Rep. 672; *Anderson v. Brewster*, 44 Ohio St. 576, 9 N. E. Rep. 683; *Streeter v. People*, 69 Ill. 595; *State v. Searcy*, 20 Mo. 489; *Thomasson v. State*, 15 Ind. 449; *Territory v. Connell*, (Ariz.) 16 Pac. Rep. 209.

⁶² *Cahen v. Jarrett*, 42 Md. 571.

certain number of citizens of his ward, etc. But this principle of selection is not repugnant to any constitutional rule. It is undoubtedly true, as a general principle, that any person has the natural right to pursue any lawful calling, and to do so in his own way, provided he infringes the rights of no other person. And of this right the individual cannot arbitrarily be deprived. Hence it is not consistent with a due recognition of personal rights to prohibit any person or class of persons from offering their services in lawful business. "But here as elsewhere," it has been very pertinently said, "it is proper to recognize distinctions that exist in the nature of things, and under some circumstances to inhibit employments to some one class, while leaving them open to others . . . Some employments, in which integrity is of vital importance, it may be proper to treat as privileges merely, and to refuse the license to follow them to any who are not reputable."⁶³ The authorities are therefore agreed that a law withholding licenses except to persons who are morally trustworthy, and otherwise qualified, and who are recommended as the act directs, is not in derogation of the general rights and liberties of the citizen, as secured by the constitution.⁶⁴ Indeed the courts have gone much further than this. Even where a license law gives an arbitrary discretion to a board or court to prevent an applicant from engaging in an occupation legalized by the state, and without any sort of regard to his personal fitness for the business or the propriety and merit of his application, they have refused to pronounce it unreasonable or unconstitutional.⁶⁵ It is next to be remarked that the fixing of the amount of the fee to be paid for a license is a matter entirely within the legislative discretion. If the legislature has power to prohibit the traffic in intoxicants altogether, (which is now conceded,) it is impossible to deny that it may fix the amount of the fee at such a figure as will be practically prohibitive, and, *a fortiori*, at such a sum as will operate as a partial restriction upon the business.⁶⁶ And since the licensing of persons to sell liquor is not an exercise of

⁶³ Cooley, Const. Lim. 597.

⁶⁴ *In re Bickerstaff*, 70 Cal. 35, 11 Pac. Rep. 393; *Lunt's Case*, 6 Me. 412; *City Council v. Ahrens*, 4 Strobb. 241.

⁶⁵ *In re Hoover*, 30 Fed. Rep. 51, affirmed in *United States v. Ronan*, 33 Fed. Rep. 117.

⁶⁶ *Tenney v. Lenz*, 16 Wis. 566.

the taxing power of the state to raise revenue, but of the police power, for the regulation and restriction of a dangerous business, it follows that the adjustment of the fees for licenses is not governed by the constitutional provisions requiring equality and uniformity of taxation.⁶⁷ In many of the states, the statutes require the licensed liquor dealer to give a bond with sureties, conditioned for the payment of all fines and penalties adjudged against him, and sometimes for damages recovered against him under the civil damage laws. Such a requirement is valid and constitutional.⁶⁸ But a statute in relation to the bonds of liquor dealers, in so far as it refuses to any one engaged in selling liquor the right to become surety on such bonds, is in violation both of a provision in the state constitution securing to every person his liberty and property and of the fourteenth amendment to the federal constitution.⁶⁹ "The right to sign a bond," said the court, in making this ruling, "or to enter into any other contract, cannot be made to depend upon the business in which one is engaged. The right to sell liquor in this state is made lawful, under certain conditions and restrictions, by the act itself . . . We agree with the learned counsel for the relator that property does not consist merely of the title and possession. It includes the right to make any legal use of it, and the right to pledge or mortgage it, and to sell or transfer it. The right to contract a debt or other personal obligation is included in the right to liberty, and one's payment of his debts, and therefore the basis of one's credit, and the right to contract a debt, or to enter into a bond or other writing or obligation, is also a right of property. Signing bonds for other parties may be the result of friendship, or because of business interests; but the right to pledge one's estate is as much a right of property as either the title or possession."

§ 47. Same; Requiring Assent of Neighbors.

The license laws commonly provide, as a necessary condition to the granting of a license in any case, that the person's application

⁶⁷ *Richland Co. v. Richland Center*, 59 Wis. 591, 18 N.W. Rep. 497; *Thomasson v. State*, 15 Ind. 449.

⁶⁸ *Bell v. State*, 28 Tex. App. 96, 12 S.

W. Rep. 410; *McGuire v. Glass*, (Tex. App.) 15 S. W. Rep. 127.

⁶⁹ *Kuhn v. Common Council*, 70 Mich. 534, 38 N. W. Rep. 470.

shall be recommended, or assented to, by a certain number of persons residing in his neighborhood, or by a majority, or other proportion, of the citizens or voters in the ward or district where he proposes to carry on business. Much objection has been made to such a requirement. But the courts have always ruled that it was no invasion of personal rights, but a lawful and proper police regulation.⁷⁰ This question received very full consideration in a recent case which originated in California and went through the state and federal courts. It concerned the validity of an ordinance of the city of San Francisco, requiring all retail liquor dealers to procure a license, and making it an offense to sell liquor without such license, and at the same time forbidding any such license to be issued unless the applicant should obtain the written consent of a majority of the board of police commissioners of the city, with a further provision that if such consent should be refused at first, it should be granted when the application received the indorsement of twelve property owners in the block or square where the business was to be carried on. In the supreme court of California it was argued that this ordinance made the license depend upon the arbitrary will and pleasure of the police commissioners in the first instance, and of the twelve property owners in the second, and therefore was invalid as an invasion of civil rights. But the court pronounced in favor of the constitutionality of the ordinance, saying "it is well settled that the governing power may prohibit the manufacture and traffic in liquor altogether, provided only that it does not interfere with interstate commerce. And if the governing power can prohibit a thing altogether, it can impose such conditions upon its existence as it pleases."⁷¹ The case next appeared in the United States circuit court, where Judge Sawyer decided that it was governed by the rule in *Nick Wo v. Hopkins*,⁷² and that the ordinance was invalid because it conferred an arbitrary power upon the designated authorities which might be so exercised as to deny to

⁷⁰ *State v. Brown*, 19 Fla. 563; *Groesch v. State*, 42 Ind. 547; *In re Hoover*, 30 Fed. Rep. 51; *Robb v. Jackson*, 51 Miss. 735; *Purdy v. Sinton*, 56 Cal.

133. Compare *People v. Haug*, 68 Mich. 549, 37 N. W. Rep. 21.

⁷¹ *Ex parte Christensen*, 85 Cal. 208, 24 Pac. Rep. 747.

⁷² 118 U. S. 356, 6 Sup. Ct. Rep. 1064.

the petitioner the equal protection of the laws.⁷³ But, on appeal to the supreme court of the United States, this decision was reversed, and it was there held that the ordinance in question was a valid exercise of the police power of the state and municipality, and not in contravention of the fourteenth amendment.⁷⁴

§ 48. Same; Discrimination against Non-Residents.

A state statute requiring dealers in intoxicating liquors to take out a license is not invalid, as in conflict with the provision of the federal constitution securing to the citizens of each state all the privileges and immunities of citizens in the several states, although it excludes non-residents from the privilege of obtaining a license, as by restricting that right to citizens of the state, or by requiring a certain term

⁷³ *In re Christensen*, 43 Fed. Rep. 243.

⁷⁴ *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. Rep. 13. From the opinion by Field, J., we extract the following: "The constitution of California vests in the municipality of the city and county of San Francisco the right to make 'all such local, police, sanitary, and other regulations as are not in conflict with general laws.' The supreme court of that state has decided that the ordinance in question, under which the petitioner was arrested, and is held in custody, was thus authorized, and is valid. That decision is binding upon us unless some inhibition of the constitution or of a law of the United States is violated by it. We do not perceive that there is any such violation. The learned circuit judge saw in the provisions of the ordinance empowering the police commissioners to grant or refuse their assent to the application of the petitioner for a license, or, failing to obtain their assent upon application, requiring it to be given upon the recommendation of 12 citizens owning real estate in the block or square in which his business as a retail dealer in liquors

was to be carried on, the delegation of arbitrary discretion to the police commissioners, and to real-estate owners of the block, which might be and was exercised to deprive the petitioner of the equal protection of the laws. And he considers that his view in this respect is supported by the decision in *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064." But, after considering the circumstances and nature of the case cited, the learned judge continued: "It will be seen that that case was essentially different from the one now under consideration, the ordinance there held invalid vesting uncontrolled discretion in the board of supervisors with reference to a business harmless in itself and useful to the community, and the discretion appearing to have been exercised for the express purpose of depriving the petitioner of a privilege that was extended to others. In the present case the business is not one that any person is permitted to carry on without a license, but one that may be entirely prohibited or subjected to such restrictions as the governing authority of the city may prescribe."

of residence within the state as one of the necessary qualifications of the applicant.⁷⁵ The constitutional guaranty in question was not designed to prevent the states from requiring such length of residence, for the enjoyment of political or municipal rights, as they might deem conducive to their welfare. To sell intoxicating liquor at retail is not a natural right to pursue an ordinary calling. To sell without a license, in states adopting the license system, is not a right that may be claimed by either citizens or strangers. "If we agree to exclude political privileges from the number of privileges and immunities which the constitution of the United States declares citizens of other states shall be entitled to, there is the same reason for extending the limitation to municipal privileges. And selling spirituous liquors in quantities less than one quart is, in this state, a *privilege* granted only to those having the qualifications pointed out in the act. A residence of two years in the state is one of the qualifications which the legislature have thought proper to require, and this qualification, we consider, is no more liable to constitutional objection than a residence of one year before a citizen from another state is allowed to vote, or a residence of five years before he can be elected to the legislature."⁷⁶ Neither is a restriction of this character repugnant to the exclusive power of congress to regulate interstate commerce. If it should have any effect upon such commerce, its relation to it would be only remote and incidental. Nor does it contravene the provision of the fourteenth amendment, that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." The object of such a restriction is not to grant greater privileges to citizens of the state than are accorded to citizens of other states, or to give the former an undue advantage over the latter, but to provide safeguards against evasions and violations of the law, by confining the privilege of selling, as a matter of police regulation, to such persons as it may be

⁷⁵ *Austin v. State*, 10 Mo. 591; *Kohn v. Melcher*, 29 Fed. Rep. 433; *Welsh v. State*, 126 Ind. 71, 25 N. E. Rep. 883; *Mette v. McGuckin*, 18 Nebr. 323, 25 N. W. Rep. 338.

⁷⁶ *Austin v. State*, 10 Mo. 591. See

further, as to the meaning of this constitutional provision, *Cortfield v. Corryell*, 4 Wash. C. C. 371; *Campbell v. Morris*, 3 Har. & Mill. 554; *Douglass v. Douglass*, 1 Del. Ch. 465; *Conner v. Elliott*, 18 How. 591.

deemed safe to intrust with this right.⁷⁷ And, on even stronger reasons, it is competent for the state to limit the issuing of licenses to "citizens of the United States of temperate habits and good moral character" who shall have complied with all the requirements of the act.⁷⁸

§ 49. Same; Restriction to Particular Classes.

A law providing for the granting of permits, to persons of good moral character, who are citizens of the county, to sell intoxicating liquors, is not in conflict with a constitutional provision that all men are equal and endowed with the right of acquiring, possessing, and protecting property; nor is it violative of a constitutional prohibition of the grant to any citizen or class of citizens, of "privileges or immunities which, upon the same terms, shall not equally belong to all citizens."⁷⁹ Such a discrimination is not only justifiable but necessary, as a matter of judicious police regulation. As Judge Cooley significantly remarks, "some employments, in which integrity is of vital importance, it may be proper to treat as privileges merely, and to refuse the license to follow them to any who are not reputable."⁸⁰ On a similar principle, it is settled that the legislature has the right to confine the sale of intoxicating liquors for medical, scientific, or mechanical purposes to such persons as qualified physicians or licensed druggists.⁸¹

§ 50. Same; Regulation of Sales by Licensees.

The legislature having the power to require liquor dealers to take out a license, and also the power to exercise a sound discretion as to the persons or classes to whom this privilege shall be granted, it follows that there is no constitutional objection to the imposition upon the licensed vendor of such reasonable and proper conditions

⁷⁷ Kohn v. Melcher, 29 Fed. Rep. 433.

⁷⁸ Trageser v. Gray, (Md.) 20 Atl. Rep. 905.

⁷⁹ *In re* Ruth, 32 Iowa, 250; Thomasson v. State, 15 Ind. 449.

⁸⁰ Cooley, Const. Lim. 597.

⁸¹ Koester v. State, 36 Kans. 27, 12 Pac. Rep. 339; Intoxicating Liquor Cases, 25 Kans. 751, 37 Am. Rep. 284; Sarrls v. Comm., 83 Ky. 327.

and restrictions as the public welfare may require, in respect to the conduct of his business, and the time, place, and manner of his sales. As we have already seen, the legislature may lawfully prohibit all persons, including the holders of licenses, from selling liquor to minors, intoxicated persons, and habitual drunkards, and also from selling on Sundays, election days, and public holidays.⁸² The license, it should be remembered, does not give any right to sell in violation of law, or at the arbitrary pleasure of the licensee, or at all such times as he may choose. Hence a statute prohibiting the sale of liquor between the hours of eleven at night and five in the morning is a proper exercise of the police power and is constitutional.⁸³ So also, a provision that a dealer shall not sell liquor in any other place than that specified in his bond, without giving notice and executing another bond, is valid.⁸⁴ And so, it being undoubtedly in the power of the legislature to regulate the manner in which drinking saloons shall be conducted, it may lawfully require the saloon-keeper to have his license posted in a conspicuous place on the premises.⁸⁵ And the same is true of the "screen law" adopted in several states. This law provides that on Sundays, and at other times when liquor saloons are required by law to be kept closed, no screen, curtain, or other obstruction shall be so placed as to prevent a clear view of the interior of the premises. It is held to be no invasion of the security guarantied by the constitution against unreasonable searches.⁸⁶ Replying to an objection against the constitutionality of such a law on the ground stated, the supreme court of Michigan observes: "The position of counsel for the relator would undoubtedly be correct were the provisions of such a statute sought to be applied to one's dwelling, or to any place where any useful business, profession, trade, or occupation is carried on; but the business of selling intoxicating liquors is one which the legislature have an undoubted right to regulate or prohibit, and they have there-

⁸² *Supra*, §§ 41, 42. And see *Lodano v. State*, 25 Ala. 64.

⁸³ *Hedderich v. State*, 101 Ind. 564, 1 N. E. Rep. 47, 51 Am. Rep. 768.

⁸⁴ *People v. Brown*, (Mich.) 48 N. W. Rep. 158.

⁸⁵ *Ex parte Bell*, 24 Tex. App. 428, 6 S. W. Rep. 197.

⁸⁶ *Robison v. Haug*, 71 Mich. 38, 38 N. W. Rep. 668; *Comm. v. Costello*, 133 Mass. 192; *Comm. v. Casey*, 134 Mass. 194.

fore the power to impose such conditions and restrictions upon the sale as in their judgment may seem wise, where such restrictions are applied to all alike or to the same class alike."⁸⁷ On the same principle, a statute of Massachusetts conferring upon the mayor and aldermen of a city, or the selectmen of a town, or any police officer or constable specially authorized by them, power to "enter upon the premises of any person licensed to sell under this act, to ascertain the manner in which such person conducts his business, and to preserve order," is held to be a reasonable exercise of the police power of the state and not unconstitutional.⁸⁸ The power to thus subject a class of persons to police surveillance must be based upon a very strong ground of public necessity. But it can hardly be denied that the exigency is sufficient to justify the measure adopted.

In regard to the effect of such regulative laws upon persons licensed before their enactment, there are settled principles of law adequate to solve all difficulties. In the first place, a license to sell liquor is not a contract, the obligation of which may not be impaired, nor does it confer vested or indefeasible rights.⁸⁹ Consequently, laws imposing additional restrictions or conditions may well apply to persons holding licenses at the time of their passage.⁹⁰ Such persons, likewise, are subject to laws prohibiting acts, in relation to their business, which were not unlawful when their licenses were issued, and to the penal consequences of violating such laws. But if a law of this character were specifically made retroactive, and it were attempted, under it, to punish an act committed before its passage and which was lawful when done, then, in that single case, it would be an *ex post facto* law, and to that extent void.⁹¹ But with this exception, the licensee must simply assume the additional burdens and responsibilities, for his license gives him no protection or immunity against changes in the laws.

⁸⁷ Robison v. Haug, 71 Mich. 38, 38 N. W. Rep. 668.

⁸⁸ Comm. v. Ducey, 126 Mass. 269.

⁸⁹ *Infra*, §§ 127, 128.

⁹⁰ Heck v. State, 44 Ohio St. 526, 9 N. E. Rep. 305.

⁹¹ State v. Isabel, 40 La. Ann. 340, 4 South. Rep. 1.

§ 51. Same; Providing for Revocation of License.

A statute providing for the revocation of licenses granted for the sale of intoxicating liquors,—*e. g.*, on conviction of the licensee for a violation of any law pertaining to the sale of liquors,—is not unconstitutional as impairing the obligation of contracts, or as taking property without due process of law; for a license is not a contract, but a mere privilege subject to the control of the government, nor does it possess the essential elements of a vested right or of property.⁹²

§ 52. Constitutionality of Search and Seizure Laws.

In most of the states adopting a prohibitory or severely restrictive plan of liquor legislation, there are statutes authorizing the issuance of warrants to search for liquors alleged to be illegally kept for sale, and directing their seizure when found, and their forfeiture or destruction when the substance of the offense is established, after notice to and hearing of claimants. In view of the constitutional provisions against unreasonable searches and seizures, the guaranties to accused persons of the right to be informed of the nature of charges against them, the requirement in all cases of due process of law, and other similar safeguards against oppressive or lawless action, such statutes must needs be carefully framed to escape the imputation of unconstitutionality. But when constructed with a due regard to all guarantied rights, they are generally held to be valid.⁹³ The foundation of the power to enact laws of this character, and their necessary limitations, have been well stated by the court in Maine, in an opinion from which we quote as follows: "Certain articles, which are treated as property while used for lawful purposes, may be

⁹² *La Croix v. Fairfield Co. Comm'rs*, 50 Conn. 321, 47 Am. Rep. 648; *Martin v. State*, 23 Nebr. 371, 36 N. W. Rep. 554.

⁹³ *State v. Miller*, 48 Me. 576; *Gray v. Kimball*, 42 Me. 299; *Lincoln v. Smith*, 27 Vt. 328; *Gill v. Parker*, 31 Vt. 610;

Allen v. Staples, 6 Gray, 491; *State v. Brennan*, 25 Conn. 278; *State v. Fitzpatrick*, 16 R. I. 54, 11 Atl. Rep. 773; *In re Horgan's Liquors*, 16 R. I. 542, 18 Atl. Rep. 279; *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487.

subjects of forfeiture and destruction, under proper statutory provisions, if their use is deemed pernicious to the best interests of the community. And when such articles are attempted to be used for unlawful purposes, or in an unlawful manner, and the attempts are so concealed that ordinary diligence fails to make such discovery as to enable the law to declare the forfeiture, statutes authorizing searches and seizures have been held legitimate. The exercise of this power must be properly guarded, that abuses may be prevented, and that a citizen shall not be deprived of his property without having an accusation against him setting out the nature and charge thereof, and but by the judgment of his peers or the law of the land; and he shall be secure in his person, houses, papers, and possessions from unreasonable searches and seizures. It is not perceived that the statute under which the suit in this case is attempted to be defended violates any of the provisions of the constitution which have been adverted to.”⁹⁴ And the supreme court of Iowa declares that “no search warrant is unreasonable, in the legal sense, when it is for a thing obnoxious to the law, and of a person and place particularly described, and is issued on oath of probable cause.”⁹⁵ But at the same time, a law of this kind which gives no opportunity to the party accused to defend his property, requires no notice to him of the seizure, or provides no means by which he is to be informed when, where, or before whom the search warrant is returned, is held repugnant to the constitutional guaranties and void.⁹⁶ A statute which, without giving the right of search, authorizes the summary seizure of intoxicating liquors without a warrant, when unlawfully kept or in process of illicit sale or transportation, is valid and constitutional.⁹⁷ But a law authorizing officers to close up places for the sale of liquor found open at certain times in violation of law, and to arrest the offender without warrant, is in violation of the constitutional provisions forbidding interference with persons or property

⁹⁴ Gray v. Kimball, 42 Me. 299, 307.
Tenney, C. J.

⁹⁵ Santo v. State, 2 Iowa, 165, 63 Am.
Dec. 487.

⁹⁶ Fisher v. McGirr, 1 Gray, 1, 61 Am.

Dec. 381; Hibbard v. People, 4 Mich.
125.

⁹⁷ State v. O'Neil, 58 Vt. 140, 2 Atl.
Rep. 586; Jones v. Root, 6 Gray, 435;
Mason v. Lothrop, 7 Gray, 354.

without due process of law and prohibiting the issuance of warrants unsupported by oath.⁹⁸

§ 53. Power to Confiscate Liquor Illegally Kept.

The "search and seizure" laws, described in the preceding section, usually contain a provision that upon hearing of the complaint, if it shall be established that the liquors seized were illegally kept for sale, (or illegally transported, or otherwise, according to the statute,) the same shall be adjudged forfeited to the use of the state or municipality, or shall be destroyed. Such a provision is constitutional.⁹⁹ The argument most frequently advanced against its validity is that by the confiscation of the goods the owner is deprived of his property, and the same is taken for public use, without compensation made. But there is no soundness in this contention. The same objection, as has been remarked, might be urged with equal propriety against almost every penal statute, as the law provides that all fines, forfeitures, and penalties, with few exceptions, shall accrue to the use of the state or of some municipal corporation. When a man is fined for any infraction of the law, it may be said, in one sense, that his money is taken for public use, but not within the meaning of that clause of the constitution. The fine is imposed, not because the public wants his money, but as a punishment for his offense, and the disposition of it does not affect the validity of the law subjecting him to the punishment. "So, in the case under consideration, the law imposes the forfeiture of the liquors, not for the benefit of the town, but as a punishment for keeping them for an unlawful purpose. Forfeitures have frequently been imposed by laws of congress, as well as by other laws of this state, none of which have ever been adjudged unconstitutional."¹⁰⁰ And in fact, as pointed out by Mr. Bishop, the oldest English enactment against liquor-selling (St. 12

⁹⁸ *People v. Haug*, 68 Mich. 549, 37 N. W. Rep. 21.

⁹⁹ *State v. Wheeler*, 25 Conn. 290; *Oviatt v. Pond*, 29 Conn. 479; *State v. Snow*, 3 R. I. 64; *Lincoln v. Smith*, 27

Vt. 328; *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381.

¹⁰⁰ *State v. Brennan's Liquors*, 25 Conn. 278.

Edw. II., c. 6, A. D. 1318) provided for a similar forfeiture; "so that the levying of the penalty on the specific article is one of the modes of fine known in that fountain whence our jurisprudence is drawn."¹⁰¹

§ 54. Power to Authorize Abatement of Liquor Nuisances.

The laws found in many of the states declaring that all buildings, places, or tenements used for the illegal sale or keeping of intoxicating liquors shall be deemed common nuisances and treated as such, are constitutional and valid.¹⁰² And so a statute which authorizes proceedings in chancery to abate a nuisance consisting of a place maintained for the unlawful sale of liquors, is valid; and it is not unconstitutional as depriving the guilty person of his property without due process of law, for the proper and orderly proceedings of a court of chancery are "due process of law" within the meaning of the constitutional guaranty.¹⁰³ The law in Iowa provides that, if the existence of a nuisance is established in either criminal or civil proceedings, it shall be abated under judgment of the court by seizing and destroying the liquor, and that the fixtures, furniture, etc., used about the premises for the manufacture or sale of liquor shall be removed and sold. This act, it is held, does not conflict with the provisions of either the state or federal constitutions relating to the rights of property.¹⁰⁴ And where a defendant, proceeded against

¹⁰¹ Bishop, Stat. Crimes, § 993.

¹⁰² *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273; *Comm. v. Howe*, 13 Gray, 26; *Streeter v. People*, 69 Ill. 595; *Our House v. State*, 4 Greene, (Iowa,) 172; *Zumhoff v. State*, Id. 526; *McLane v. Leicht*, 69 Iowa, 401, 29 N. W. Rep. 327; *Littleton v. Fritz*, 65 Iowa, 488, 22 N. W. Rep. 641, 54 Am. Rep. 19; *State v. Crawford*, 28 Kans. 726.

¹⁰³ *State v. Jordan*, 72 Iowa, 377, 34 N. W. Rep. 285; *Carleton v. Rugg*, 149 Mass. 550, 22 N. E. Rep. 55.

¹⁰⁴ *Craig v. Werthmueller*, 78 Iowa, 598, 43 N. W. Rep. 606. The following is an extract from the opinion in this case: "The appellees contend that

though they did create and maintain nuisances as alleged in the amendment to the petition, no decree should be entered against them for the seizure and destruction of their liquors, nor for the removal and sale of furniture, fixtures, etc., because the law authorizing the same is in conflict with amendments 4 and 14 to the constitution of the United States, and sections 8 and 9, bill of rights, and article 3, Const. Iowa. Their contention is that property of an individual cannot be confiscated or forfeited by legislative enactment, but only by the judgment of a court, in accordance with due process of law; and that by said laws the legislature forfeits

under this act, removed the case to the federal court, on the ground that he was virtually deprived of his right to a trial by jury, and of his property without due process of law, it was held that no federal question was involved, and that the cause should be remanded to the state court.¹⁰⁵ And if the corporate powers conferred upon a municipality are broad enough to authorize an ordinance declaring the selling of spirituous liquors a nuisance, and imposing a fine for the offense, such ordinance is valid.¹⁰⁶

§ 55. Taxation of Liquor Traffic.

It may be regarded as now well settled that the legislature of a state has full constitutional power to impose a tax upon the business of liquor dealers, wholesalers as well as retailers, and to declare who shall constitute such dealers.¹⁰⁷ And it is to be observed that such

the property in question, and does not leave such forfeiture to the court; that property cannot be forfeited by an action against the person, but must be by action against the thing, and that in a criminal case for nuisance the property is not involved, and that the defendant is entitled to his day in court upon the question of the forfeiture of his property. We understand the law to be that property of individuals cannot be forfeited by legislative enactment; that such forfeitures can only be by the judgment of a court of competent jurisdiction, in a proper case, after due notice. This statute does not forfeit property by legislative enactment, but, as in many other instances, authorizes and requires the courts, in cases where it has been established upon judicial investigation that property is such, or has been so used, as to constitute a nuisance, to abate the nuisance by destroying and selling the property. It is only by the judgment of a court that any person may rightfully destroy liquors found upon the defendants' premises described, or remove therefrom and sell the furniture, fixtures, etc., therein. In

actions, either criminal or equitable, wherein the existence of a nuisance is established under the law in question, the action is against the thing—the place—as well as against the person. In either case the question is whether the place was a nuisance, and, if so, then whether the person was engaged in keeping it. Such actions are against the thing as well as the person, and the person has due notice, and his day in court, in which to defend against the forfeiture of his property as well as the punishment of himself."

¹⁰⁵ Schmidt v. Cobb, 119 U. S. 286, 7 Sup. Ct. Rep. 1373.

¹⁰⁶ Goddard v. Jacksonville, 15 Ill. 588, 60 Am. Dec. 773.

¹⁰⁷ Kurth v. State, 87 Tenn. 134, 5 S. W. Rep. 593; State v. Rouch, (Ohio,) 25 N. E. Rep. 59; Senior v. Ratterman, 44 Ohio St. 661, 11 N. E. Rep. 321; Albrecht v. State, 8 Tex. App. 216; Durach's Appeal, 62 Pa. St. 491; *Ex parte* Marshall, 64 Ala. 266; Westinghausen v. People, 44 Mich. 265, 6 N. W. Rep. 641; Portwood v. Baskett, 64 Miss. 213, 1 South. Rep. 105.

an exaction, whether imposed as a license-fee or under the name of a tax, is not primarily designed as a means of raising revenue but as a means of limiting and restricting a traffic which is dangerous to the best interests of the community, and therefore it is not in reality an exercise of the taxing power of the state, but of its police power. For this reason, and also because it is a tax upon the business or traffic rather than upon the property invested in it, the validity of such a law is not to be tested by its conformity to the constitutional restrictions upon the taxing power, further than that it should be uniform in its operation upon manufacturers or dealers of the same class.¹⁰⁸ Hence a tax upon the occupation of a retailer of liquors, not being a tax on his stock in trade, like an *ad valorem* assessment, although it may extract more money from some dealers than from others, is not thereby impugned, in respect to its equality and uniformity, in a constitutional sense; and the automatic contrivance known as the "register" or "bell-punch" is legitimately furnished at each dealer's expense, to count the drinks he dispenses, and thus adjust the tax he must pay.¹⁰⁹

§ 56. Constitutionality of Civil Damage Laws.

In many of the states there are statutes providing that certain classes of persons, upon sustaining injuries from the acts of an intoxicated person, or in consequence of his intoxication, habitual or otherwise, shall have a right of action in damages against the persons who, by selling or giving him liquor, produced such intoxication, or contributed thereto, in whole or in part. These statutes are commonly known as the "civil damage" laws. Their constitutionality has always been sustained by the courts. They are held to be valid and legitimate exertions of the legislative power.¹¹⁰ In particular, it is no ground of objection to the constitutionality of such a statute that the person sought to be made liable thereunder had a license to

¹⁰⁸ *Senior v. Ratterman*, 44 Ohio St. 661, 11 N. E. Rep. 321; *State v. Hudson*, 78 Mo. 302; *Thomasson v. State*, 15 Ind. 449.

¹⁰⁹ *Albrecht v. State*, 8 Tex. App. 216.

¹¹⁰ *Moran v. Goodwin*, 130 Mass. 158,

39 Am. Rep. 443; *Baker v. Pope*, 2 Hun, 556; *Franklin v. Schermerhorn*, 8 Hun, 112; *Sibila v. Bahney*, 34 Ohio St. 399; *Horning v. Wendell*, 57 Ind. 171; *Werner v. Edmiston*, 24 Kans. 147.

sell, lawfully issued, at the time the civil damage law took effect; for the license is not a contract, the obligation of which may not be impaired, and when the holder acquired the privilege which it conferred, he took it subject to any additional burdens or responsibilities which the law might impose.¹¹¹ Further, although such a law makes a liquor-seller liable to the full extent for the results of an intoxication to which his own sales contributed *in part* only, it is not unconstitutional as holding one man responsible for the acts of another. In a case in which this argument was pressed, the supreme court of Ohio observed: "The business of the defendant, as conducted by him, being in open violation of the statute, a provision that holds him responsible for an injury to which his unlawful conduct contributes, cannot be said to be in conflict with any right guaranteed by the constitution. . . . By causing, in conjunction with others, the injury for which the action is brought, by an act in clear violation of the statute, he becomes a joint tort-feasor, and, as at common law, is liable for the entire damages resulting from such injury."¹¹² It is an additional feature of the civil damage laws in some of the states that they authorize a recovery against the liquor-dealer's lessor, when the latter knowingly permits the traffic to continue on the premises. This also is constitutional. It is held that the legislature may create a cause of action in damages, in favor of one injured in person or property by the act of an intoxicated person, against the owner of real property, whose only connection with the injury is that he leased the premises where the liquor was furnished, with knowledge that intoxicants were to be sold there. Such a provision is not in conflict with the constitutional prohibition against taking private property without compensation. While it may indirectly operate to restrain the absolute freedom of the owner in the use of his property, and so impair its value, this is not a "taking" within the meaning of the constitution. All property is held subject to the general police power of the state to regulate or control its use to secure the general safety and the public welfare.¹¹³

¹¹¹ Moran v. Goodwin, 130 Mass. 158, 39 Am. Rep. 443; Baker v. Pope, 2 Hun, 556; Horning v. Wendell, 57 Ind. 171.

¹¹² Sibila v. Bahney, 34 Ohio St. 399.

¹¹³ Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323.

§ 57. Laws Prohibiting Recovery for Liquor Sold.

A statutory provision that no action of any kind shall be maintained within the state "for the recovery or possession of spirituous liquors or the value thereof," the same being kept for sale in violation of law, is valid and constitutional.¹¹⁴ So also is a law providing that no action shall be maintained for intoxicating liquor purchased out of the state for sale within the state in violation of law.¹¹⁵ But in New York it has been held that a law compelling persons to prove that any liquor for the value of which they would bring an action was sold according to the law, or lawfully kept and owned by them, was unconstitutional and void.¹¹⁶

§ 58. Power of State to Punish Illicit Traffic Criminally.

That it is within the power of the state, as a means of enforcing its restrictive or prohibitory laws, to provide for the punishment of the act of unlawfully selling intoxicating liquors, by fine or imprisonment, is not open to serious question. Such enactments are not in violation of any constitutional rights or liberties.¹¹⁷ And although the mere possession of the instruments of crime is not an overt act punishable at common law, yet a statute is valid which makes it an offense to keep intoxicating liquors with intent to sell the same in violation of law. As observed by the court in Vermont, "there are many ancient and modern statutes, English and American, that make bare possession, when accompanied with the intent, a sufficient act in the cases for which they provide. It was admitted in argument for the prisoner in *King v. Sutton* (as reported in *Cas. t. Hardw.* 370) that bare possession with the intent could be made a crime by positive enactment. And so it has always been considered, else these statutes would not have been so long and so often enforced, and no

¹¹⁴ *Thurston v. Adams*, 41 Me. 419.

¹¹⁵ *Barrett v. Delano*, (Me.) 14 Atl. Rep. 288; *Meservey v. Gray*, 55 Me. 540.

¹¹⁶ *People v. Toynbee*, 2 Park. (N. Y.) 329.

¹¹⁷ *Comm. v. Clapp*, 5 Gray, 97; *Comm. v. Murphy*, 10 Gray, 1; *Luton v. Palmer*, 69 Mich. 610, 37 N. W. Rep. 701.

question made about it."¹¹⁸ A law is not objectionable as *ex post facto* which, in providing for the punishment of future offenses, authorizes the offender's conduct in the past to be taken into account, and the punishment to be graduated accordingly. For instance, a statute imposing a heavier penalty for a second offense of keeping liquors contrary to law is not *ex post facto* as applied to a case where the second offense was committed after the passage of the law.¹¹⁹ For it is the second offense to which the additional penalty is attached, not the first, and the law is therefore prospective. But if both the first and second offense preceded the enactment of the law, then it would be unconstitutional, for it would aggravate the punishment of a crime already past.¹²⁰

§ 59. Power to Exact Penalties and Forfeitures.

A provision in a liquor law, that a conviction of the licensee for a violation of the law shall work a forfeiture of his bond, is not unconstitutional as taking the property of the surety without due process of law; for the bond is entered into in view of the provision of the statute as to what shall constitute a breach, and the provision thus becomes a part of the obligation.¹²¹ A statute passed after suit commenced to abate a liquor nuisance, giving attorney's fees against defendants in such cases, as part of the taxable costs, applies to such case, and is not an *ex post facto* law, as it applies to the remedy and not to the penalty.¹²² So also, a law providing that a judgment for a fine for a violation of the liquor law shall be a lien on the property of a third person used with his consent for such unlawful sale, is constitutional.¹²³

¹¹⁸ State v. Wheeler, (Vt.) 20 Atl. Rep. 601.

¹¹⁹ State v. Woods, 68 Me. 409. See, also, Rand v. Comm., 9 Gratt. 738; *Ex parte* Gutierrez, 45 Cal. 430; People v. Butler, 3 Cow. 347.

¹²⁰ Ross's Case, 2 Pick. 165; Black, Const. Prohib. § 241.

¹²¹ Welch v. McKane, 55 Conn. 25, 10 Atl. Rep. 168.

¹²² Drake v. Jordan, 73 Iowa. 707, 36 N. W. Rep. 653; Campbell v. Manderscheid, 74 Iowa, 708, 39 N. W. Rep. 92.

¹²³ Polk Co. v. Hierb, 37 Iowa, 361; Hardten v. State, 32 Kans. 637, 5 Pac. Rep. 212; State v. Snyder, 34 Kans. 425, 8 Pac. Rep. 860.

§ 60. Laws Relating to Rules of Evidence.

The legislature has undoubtedly a very extensive power in respect to fixing or modifying the rules of evidence to be applied by the courts.¹²⁴ The exercise of this power, however, in relation to criminal proceedings, is subject to certain important limitations, among which are the following: (1) The legislature, in enacting rules of evidence, must not usurp judicial functions; (2) such rules must not be of the nature of *ex post facto* laws¹²⁵ or illegally retroactive in their operation; (3) they must not deprive the accused of his constitutional right to be confronted with the witnesses against him; (4) the legislature cannot compel a defendant to furnish evidence against himself; (5) nor deprive him of his right to a trial by jury; (6) it would be unlawful to make any given fact or state of facts conclusive evidence of guilt, in negation of the common law presumption of innocence. The rules of evidence in prosecutions under the liquor laws have frequently been the subject of legislative attention, and the changes made have sometimes shown a wide departure from common law principles. All such statutes — which, for the most part, are designed to facilitate convictions by admitting presumptive or indirect proof of certain facts — must be brought to the test of constitutional principles such as those above enumerated. If found to be in violation thereof, they are not defensible on any ground of public policy or the welfare of the community. As a rule, however, these acts have been so framed as to escape constitutional objection. Thus, a provision that, in prosecutions for common selling of intoxicating liquors, delivery in or from any building or place other than a dwelling-house shall be deemed *prima facie* evidence of a sale, is constitutional and valid.¹²⁶ “This neither conclusively determines the guilt or innocence of the party who is accused, nor withdraws from the

¹²⁴ See *Ralston v. Lothain*, 18 Ind. 303; *Rich v. Flanders*, 39 N. H. 304; *Cooley*, Const. Lim. 367; *Black*, Const. Prohib. § 202.

¹²⁵ A law “that alters the legal rules of evidence, and receives less or different testimony than the law required at

the time of the commission of the offense, in order to convict the offender,” is *ex post facto*. *Calder v. Bull*, 3 Dall. 390.

¹²⁶ *Comm. v. Williams*, 6 Gray, 1; *Comm. v. Wallace*, 7 Gray, 222; *Comm. v. Rowe*, 14 Gray, 47.

jury the right and duty of passing upon and determining the issue to be tried."¹²⁷ And the same is true of a statute providing that, whenever an unlawful sale of liquor is alleged and a delivery proved, it shall not be necessary to prove a payment, but such delivery shall be sufficient evidence of sale.¹²⁸ So a law of New York enacts that where a person is seen to drink intoxicating liquor on the premises of one who has simply a license to sell liquor for consumption off the premises, it shall be *prima facie* evidence that the liquor was sold by the occupant of the premises with the intent that it should be drunk thereon. This, it is held, is not violative of the constitutional guaranties of due process of law and trial by jury.¹²⁹ A statutory provision that, on a trial for keeping liquor in violation of the act, proof of the finding of such liquor in the possession of the accused, under certain circumstances specified in the act, shall be received and acted upon by the court as presumptive evidence that such liquor was kept or held for sale contrary to law, is not unconstitutional.¹³⁰ So a law which provides that it shall not be necessary to prove an actual sale of intoxicating liquors in any tenement, in order to establish the character of such premises as a common nuisance, but the notorious character of such premises shall be evidence of that fact, is not invalid on the ground that it makes mere reputation criminal; it merely makes the reputation of the premises evidence of their character, and leaves it for the jury to find the owner of the premises guilty or not as they may determine.¹³¹ Nor is this law in conflict with the constitutional provision which secures to all persons prosecuted for crimes the right to be confronted with the witnesses against them, since it is the fact that the reputation exists which is put in proof, and the persons testifying to this fact are the witnesses, and not the people whose utterances created the reputation.¹³² And a statute which imposes a pen-

¹²⁷ Comm. v. Williams, 6 Gray, 1.

¹²⁸ State v. Hurley, 54 Me. 562; State v. Day, 37 Me. 244.

¹²⁹ Auburn Excise Comm'rs v. Merchant, 103 N. Y. 143, 8 N. E. Rep. 484, 57 Am. Rep. 705.

¹³⁰ State v. Cunningham, 25 Conn. 195; Santo v. State, 2 Iowa, 165, 63 Am. Dec.

487; State v. Higgins, 13 R. I. 330, 43 Am. Rep. 26, note.

¹³¹ State v. Wilson, 15 R. I. 180, 1 Atl. Rep. 415.

¹³² State v. Waldron, 16 R. I. 191, 14 Atl. Rep. 847. This case was ruled mainly on the analogy of the admissibility of dying declarations, in which case, as the court observed, the person who testifies

alty for keeping a place in which it is reputed that intoxicating liquors are kept for sale is not unconstitutional, the defendant being at liberty to show that the reputation is unfounded.¹³³

§ 61. Laws Relating to Criminal Pleading.

A law which provides that, in criminal prosecutions under the liquor laws, the form of the statute, if substantially followed in the complaint, shall be sufficient in law to fully and plainly describe the offense, is not violative of the constitutional provision securing to the accused "the right to be informed of the nature and cause of the accusation against him, provided the statute contains enough to amount to a substantial description of the offense to be charged."¹³⁴ A statute providing that "no negative allegations of any kind need be averred or proved in any complaint" under the liquor law, does not violate any constitutional right of the accused.¹³⁵ But while the legislature has power to modify and simplify the forms of criminal process, it cannot make valid or sufficient a complaint or indictment in which the accusation is not "formally, fully, and precisely set forth," so that the accused may know of what he is alleged to be guilty, and be prepared to meet the exact charges against him.¹³⁶ Thus, where a law making it an offense to sell intoxicating liquors without a license, authorized the courts to dispense with the allegation, in an indictment for such offense, that the liquor was sold without a license, it was held that this provision violated the guaranty that no citizen should be deprived of liberty or property except by due course of the law of the land.¹³⁷ An infraction of the liquor laws is not an "infamous crime," such that the proceeding for its punishment must be begun by indictment.¹³⁸

as to the declarations (repeats them) is the witness, against the accused, and who must be confronted with him, and not the person who made the declarations.

¹³³State v. Thomas, 47 Conn. 546, 36 Am. Rep. 98. But compare State v. Kartz, 13 R. I. 528; State v. Beswick, 13 R. I. 211, 36 Am. Rep. 102, note.

¹³⁴State v. McKenna, 16 R. I. 398, 17 Atl. Rep. 51; State v. Kane, 15 R. I. 395, 6 Atl. Rep. 783; State v. Murphy, 15 R. I. 543, 10 Atl. Rep. 585.

¹³⁵State v. Beswick, 13 R. I. 211.

¹³⁶State v. Learned, 47 Me. 426.

¹³⁷Hewitt v. State, 25 Tex. 722.

¹³⁸State v. Nolan, 15 R. I. 529, 10 Atl. Rep. 481.

§ 62. Constitutional Right of Trial by Jury.

The right of trial by jury is secured to the defendant in all criminal prosecutions, by the sixth and fourteenth amendments to the federal constitution and by similar guaranties in most or all of the states. That the subject of liquor-selling is one that belongs peculiarly to the police power of the state is no justification for any statute abridging or denying this right. The circumstances under which it may be claimed are the same under the liquor laws as under any other branch of the penal law. But it is not every proceeding that may result in punishment which involves this constitutional right. For instance, proceedings according to the common law for contempt of court have never been subject to the right of trial by jury. Hence the constitutional guaranty is not infringed by a statute which authorizes the courts, when a person violates an injunction restraining him from selling intoxicating liquors, to punish him, as for contempt, by fine or imprisonment.¹³⁹ In the case of proceedings distinctively criminal in their nature, much will depend upon the words in which the guaranty is expressed in the particular state and upon its ancient practice in this regard. In some states it has always been held that a jury was not claimable as of right on the trial of petty offenses. And hence summary trials and convictions, without the intervention of a jury, for violations of municipal ordinances on the subject of liquor-selling, do not conflict with the rights of the accused under the constitution, and are lawful.¹⁴⁰ On the other hand, in Pennsylvania, where the constitutional provision is that "trial by jury shall be as heretofore," and where selling liquor without license was an indictable offense by statute in the colonial period and before the constitution, it is held that an act allowing one to be convicted before a justice by a jury of six persons for such selling, is unconstitutional.¹⁴¹ In the next place, it is a well-settled principle that a statute which authorizes a magistrate or other inferior court to try and determine

¹³⁹ *Eilenbecker v. District Court*, 134 U. S. 31, 10 Sup. Ct. Rep. 424.

¹⁴⁰ *Floyd v. Comm'rs of Eatonton*, 14 Ga. 354; *State v. Conlin*, 27 Vt. 318.

¹⁴¹ *Comm. v. Saal*, 10 Phila. 496. And see *People v. Baird*, 11 Hun, 289.

criminal cases without a jury, but which also gives a free and unfettered right to appeal from the judgment of such court to a court which tries by jury, is not open to an objection on the ground of denying the right of trial by jury. This principle is applied to proceedings under the liquor laws.¹⁴² The appeal, however, must not be clogged by any prohibitive or unreasonable restrictions. The defendant cannot complain if he is required to pay the costs below, with a small counsel fee, before his appeal is allowed; as this is not such a burdensome condition as to amount to an abridgment of his right.¹⁴³ And so a statute which provides that liquors against which judgment of forfeiture has been entered shall be "forthwith" destroyed, unless an appeal be taken, is not unconstitutional because, as prerequisite to the appeal, by which alone the owner can secure a jury trial, good and sufficient sureties must be furnished, and no definite time is fixed in which to secure them; because the use of the word "forthwith" does not imply that a reasonable time is not to be allowed.¹⁴⁴ But where the statute provides that if any person claims an appeal from a judgment rendered against him by a magistrate for a violation of the liquor laws, he shall, before his appeal shall be allowed, give a bond with two good and sufficient sureties, conditioned that he will not, during the pendency of such appeal, violate any of the provisions of the act, this requirement, it is held, interposes an improper obstacle in the way of the appeal, and thereby impairs his constitutional right to be tried by a jury.¹⁴⁵

§ 63. Measure of Punishment to be Inflicted.

In their zeal for the suppression of illicit dealing in intoxicating liquors, the states have sometimes been led to enact penalties so severe as to be open to constitutional objection. Thus, the Michigan liquor law of 1887 provided that persons having furnished bond and paid a tax in compliance therewith, should, on any violation of

¹⁴² *State v. Brennan's Liquors*, 25 Conn. 278; *Beers v. Beers*, 4 Conn. 535; *Emporia v. Volmer*, 12 Kans. 622; *State v. Fitzpatrick*, 16 R. I. 54, 11 Atl. Rep. 773; *Jones v. Robbins*, 8 Gray, 329.

¹⁴³ *Littlefield v. Peckham*, 1 R. I. 500.

¹⁴⁴ *In re Liquors of McSoley*, 15 R. I. 608, 10 Atl. Rep. 659.

¹⁴⁵ *Saco v. Wentworth*, 37 Me. 165; *Saco v. Woodsum*, 39 Me. 258; *In re Liquors of McSoley*, 15 R. I. 608, 10 Atl. Rep. 659.

the law, in addition to the penalties for such violation, forfeit their tax paid (which might be as high as \$800) and be unable to continue business, or become surety on a bond under the act, for one year. And another provision of the same law was to the effect that a druggist, on failure to keep a public record of purchasers and purposes of purchase, in any single instance, should be subject to a fine of from \$100 to \$500, and imprisonment for a period between ninety days and a year, and for a second offense, be disqualified to sell liquor for any purpose for five years. It was held that both these clauses were in violation of the constitutional provision against excessive fines and unusual punishments, and therefore could not lawfully be enforced.¹⁴⁶

§ 64. Title and Subject-Matter of Laws.

The constitutions of the several states usually contain a provision that no statute shall contain matter not expressed or referred to in its title. And the validity of liquor laws has frequently been assailed for want of conformity to this requirement. We propose briefly to review the decisions under this head, and indicate the principles which have influenced their determination. A title very commonly adopted for laws of this character is "An act to regulate the sale of intoxicating liquors." Now the word "regulate" is one of wide import. And almost any provisions, which do not forbid the sale of liquor entirely, but contemplate its sale subject to restrictions and penalties, are germane to such a title. For example, a statute so entitled may lawfully interdict sales by the small measure;¹⁴⁷ this is regulation and not prohibition. So also, a statute with this caption is not invalid because it contains provisions relating to the duties of constables, and to liquor nuisances, and repealing local license laws.¹⁴⁸ But it is well settled that *regulation* and *prohibition* are essentially and irreconcilably distinct things. And therefore an act which professes in its title to merely regulate the traffic in liq-

¹⁴⁶ *People v. Haug*, 68 Mich. 549, 37 N. W. Rep. 21.

¹⁴⁷ *State v. Circuit Court*, 50 N. J. Law, 585, 15 Atl. Rep. 272.

¹⁴⁸ *Comm. v. Sellers*, 130 Pa. St. 32, 18 Atl. Rep. 541.

nors, but in its body entirely prohibits their manufacture or sale,—or provides for prohibition by local option,—is invalid for containing matter not expressed in its title.¹⁴⁹ Again, an act entitled as above, which, in one of its sections, fixes a penalty for being drunk in a public place, without reference to how the liquor was obtained, is open to the same constitutional objection.¹⁵⁰ Whether the *sale* and the *gift* of liquor are so essentially different as to require the mention of both in the title of a law which prohibits both, is a question upon which the authorities are not entirely agreed. Most of the cases applicable to the point instruct us that the fact that gifts of liquor (to a minor, for example) are made an offense in the body of the act, while the title prohibits the sale only, does not render the act unconstitutional. For the one subject of such a law is the prohibiting or restraining minors from obtaining intoxicating liquors, and that subject is sufficiently described in the title. Making it unlawful to “sell, dispose of, barter, or give” the liquor, is but the means of effecting the object of the law.¹⁵¹ But in Texas, where the constitution provided for the enactment by the legislature of a local option law, which should refer to the people the question “whether the *sale* of intoxicating liquors should be prohibited,” it was held that the legislature had no power to prohibit the *gift* as well as the sale of liquors.¹⁵² It is also held that a local option law for a particular county may well be entitled “an act to prohibit the sale” of liquors in such county;¹⁵³ and that it is not invalidated by the incorporation of the usual provisions as to submitting it to the people of the county, etc., as they declare the manner of the prohibition.¹⁵⁴ But an act entitled “to constitute the town of B. and vicinity, in B. county, a separate school district,” cannot constitutionally contain

¹⁴⁹ *In re Hauck*, 70 Mich. 396, 38 N. W. Rep. 269; *People v. Gadway*, 61 Mich. 285, 28 N. W. Rep. 101; *Town of Cantril v. Sainer*, 59 Iowa, 26, 12 N. W. Rep. 753; *Miller v. Jones*, 80 Ala. 89; *Bronson v. Oberlin*, 41 Ohio St. 478; *Heise v. Council*, 6 Rich. Law, 404; *Sweet v. Wabash*, 41 Ind. 7.

¹⁵⁰ *People v. Beadle*, 60 Mich. 22, 26 N. W. Rep. 800.

¹⁵¹ *Parkinson v. State*, 14 Md. 184, 74

Am. Dec. 522; *State v. Adamson*, 14 Ind. 296; *Thomasson v. State*, 15 Ind. 449. See *Stickrod v. Comm.*, 86 Ky. 285, 5 S. W. Rep. 580.

¹⁵² *Holley v. State*, 14 Tex. App. 505.

¹⁵³ *Neighbors v. Comm.*, (Ky.) 9 S. W. Rep. 718.

¹⁵⁴ *McGruder v. State*, 83 Ga. 616, 10 S. E. Rep. 281; *Helverstine v. Yantes*, 88 Ky. 695, 11 S. W. Rep. 811.

a prohibition against the sale of intoxicating liquors within the district, as that is not pertinent or germane to the subject expressed.¹⁵⁵ A statute entitled "an act to provide a remedy against persons selling liquors to husbands and children," which also prohibits the sale of liquor to minors, intoxicated persons, and habitual drunkards, and gives a right of action against the seller, is not unconstitutional, as embracing more than one subject, nor as containing a provision not covered by its title.¹⁵⁶ But where nothing further appears in the title than that the statute is an amendment to one entitled "an act to prevent the sale or giving or delivering liquors to minors," it cannot constitutionally contain a clause prohibiting the sale of liquor to drunken husbands.¹⁵⁷ In general, it is said, though some of the provisions found in an act may be civil, and others penal, in their character, yet the act cannot be said to embrace more than one subject-matter and matters properly connected therewith.¹⁵⁸ Other decisions relating to the general subject of this section are collected in the margin.¹⁵⁹

§ 65. Constitutional Provisions as to Enactment of Laws.

Where the constitution contains a provision that no bill shall become a law unless passed in each house of the legislature by a majority of the members elected, it is held that a law relating to local option in a certain county, which refers to an earlier and existing statute, and provides that in a certain event "said act shall apply therein as heretofore," is merely a recognition of the existing policy of the district, and not an attempt to re-enact the former law unconstitutionally.¹⁶⁰

¹⁵⁵ *Montgomery v. State*, 88 Ala. 141, 7 South. Rep. 51.

¹⁵⁶ *Flower v. Witkovsky*, 69 Mich. 371, 37 N. W. Rep. 364; *People v. Laning*, 73 Mich. 284, 41 N. W. Rep. 424.

¹⁵⁷ *Hyman v. State*, 87 Tenn. 109, 9 S. W. Rep. 372.

¹⁵⁸ *Thomasson v. State*, 15 Ind. 449.

¹⁵⁹ *Matter of De Vaucene*, 31 How. Pr. 289, 337; *Hatfield v. Comm.*, 120 Pa. St. 395, 14 Atl. Rep. 151; *In re Pollard*, 127 Pa. St. 507, 17 Atl. Rep. 1087; *Comm. v.*

Hill, 127 Pa. St. 540, 19 Atl. Rep. 141; *Ramagnano v. Crook*, 85 Ala. 226, 3 South. Rep. 845; *Gandy v. State*, 86 Ala. 20, 5 South. Rep. 420; *McArthur v. State*, 69 Ga. 444; *Alberson v. Mayor*, 82 Ga. 30, 8 S. E. Rep. 869; *Gayle v. Owen County Court*, 83 Ky. 61; *Ex parte Burnside*, 86 Ky. 423, 6 S. W. Rep. 276; *Albrecht v. State*, 8 Tex. App. 216.

¹⁶⁰ *Temnick v. Owings*, 70 Md. 246, 16 Atl. Rep. 719.

CHAPTER IV.

LIQUOR LEGISLATION AND THE REGULATION OF COMMERCE.

- § 66. Police Power Limited by Commercial Power of Congress.
- 67. The Rule in *Brown v. Maryland*.
- 68. Exemption of Foreign Imported Liquors from State Laws.
- 69. The Decision in the License Cases.
- 70. Interstate Commerce and the Police Power.
- 71. Importation from Another State—*Bowman v. Railway*.
- 72. The "Original Package" Decision.
- 73. Cases Following *Leisy v. Hardin*.
- 74. Effects of this Decision.
- 75. What Constitutes an Original Package.
- 76. Enactment of the Wilson Law.
- 77. Constitutionality of Wilson Law.
- 78. Operation and Effect of Wilson Law.
- 79. Discrimination against Citizens and Products of Other States.

§ 66. Police Power Limited by Commercial Power of Congress.

The power of a state, in the exercise of its police jurisdiction, to prohibit or regulate the traffic in intoxicating liquors, for the preservation of the public health and morals, does not warrant the enactment of laws infringing positive provisions of the federal constitution. That constitution is the supreme law, and all state laws, of whatever character, and in whatever right enacted, are void if they do not conform to its terms. By that instrument, congress is invested with exclusive power to regulate commerce with foreign nations and among the several states. It follows that if any law of a state relating to the manufacture or sale of intoxicants, operates as a regulation of foreign or interstate commerce, in derogation of the power or the action of congress in that regard, it is, in so far as it produces that effect, unconstitutional and void. Several very difficult and very important questions have arisen in the determination of the nature of such commerce and its regulation, and of the limits of state authority as fixed by this clause of the constitution. These questions we propose to consider in the present chapter.

§ 67. The Rule in *Brown v. Maryland*.

In respect to goods imported from foreign countries, the validity of state laws prohibiting or regulating their sale was determined as early as 1827, in the leading case known as *Brown v. Maryland*.¹ It was there held that an article authorized by a law of congress to be imported from abroad continued to be a part of the foreign commerce of the country, and therefore subject to no restriction or exaction other than that imposed by congress, so long as it remained in the hands of the importer for sale, in the original bale, package, or vessel in which it was imported; that the authority given to import necessarily carried with it the right to sell the imported article in the form and shape in which it was imported; that no state, either by direct assessment, or by requiring a license from the importer before he was permitted to sell, could impose any burden upon him, or upon the property imported, beyond what the law of congress had itself imposed; but that when the original package was broken up for use or for retail by the importer, and also when the commodity had passed from his hands into the hands of a purchaser, then it ceased to be an import or a part of foreign commerce, and became incorporated into the mass of property in the state, and from that point was subject to the laws of the state, and might be taxed for state purposes, and the sale regulated or restricted by the state, like any other property.

§ 68. Exemption of Foreign Imported Liquors from State Laws.

The rule established in the foregoing case stood unshaken until changed by statute. It was settled and accepted law that the importer of liquors from a foreign country might himself sell them, in the original package of importation, without regard to any law of the state which would be applicable to such sales under other circumstances.² And if a state law, by reason of its general terms, would

¹12 Wheat. 419.

v. Lott, 8 Wall. 148; *Welton v. Mis-*

²*Low v. Austin*, 13 Wall. 29; *Hinson* *souri*, 91 U. S. 275; *State v. Robinson*,

apply to such sale by the importer in the original package, it must be understood as subject to a proviso that its enactments should not apply in that particular case,³ or else, in such application, it would be unconstitutional. But the limitations of the rule, as pointed out in the leading case, also came to be firmly established. That is, if the sale was made by the importer himself, but not in the original package, but in the portions or separate items into which it had been by him broken up; or if the sale was made by any purchaser from the importer, irrespective of the condition of the goods as to original or broken parcels; in either of these cases, the sale was subject to the laws of the state, because the property had then lost its character as an import and was removed from the protection of federal law.⁴ As explained in one of the decisions cited, the right is neither general as to persons, nor in its application to the property to which the laws of the United States relate. On the contrary, it is limited to certain persons and qualified by the *status* of the property. While it is in the hands of the importer, and in the condition in which it was imported, the laws under which he has imported it give *him* the right to sell it in that condition. But this is the extent of the right. When he parts with the property, or changes its condition, his right, and *all* right to sell it, derived from those laws, ceases.⁵ Thus we see that there is no sanctity in the unbroken condition of the package after it has left the importer's hands. An import ceases to be such the moment the importer becomes the vendor and sells the arti-

49 Me. 285; *State v. Intoxicating Liquors*, 82 Me. 558, 19 Atl. Rep. 913; *State v. Fuller*, 33 N. H. 259; *Jones v. Hard*, 32 Vt. 481; *Comm. v. Kimball*, 24 Pick. 359, 35 Am. Dec. 326; *State v. Amery*, 12 R. I. 64; *State v. Allmond*, 2 Houst. 612; *Wynehamer v. People*, 20 Barb. 567; *People v. Quant*, 2 Park. (N. Y.) 410; *Bode v. State*, 7 Gill, 326; *Hinson v. Lott*, 40 Ala. 123; *Sears v. Warren Co.*, 36 Ind. 267.

³ *State v. Fuller*, 33 N. H. 259.

⁴ *State v. Robinson*, 49 Me. 285; *Comm. v. Kimball*, 24 Pick. 359, 35 Am. Dec. 326; *State v. Peckham*, 3 R. I. 289; *Wynehamer v. People*, 20 Barb. 567;

People v. Quant, 2 Park. (N. Y.) 410; *State v. Allmond*, 2 Houst. 612; *City Council v. Ahrens*, 4 Strobh. 241; *Hinson v. Lott*, 40 Ala. 123; *Sears v. Warren Co.*, 36 Ind. 267. Under the Massachusetts law of 1852, intoxicating liquors might be sold by any person, though not himself the importer, in the original unbroken packages in which they were imported. *Bradford v. Stevens*, 10 Gray, 379. But this was because the state permitted it, not because it could not, as to others than the importer, prohibit it.

⁵ *Wynehamer v. People*, 20 Barb. 567.

cle. In the hands of the retailer or distributor, it is an article of the internal trade and commerce of the state, and as such is subject to its police regulations.⁶

But what the importer could do himself he could do by an agent or representative. For example, a state statute requiring every auctioneer to collect and pay into the state treasury a tax on his sales was, when applied to imported goods in the original packages, by him sold for the importer, in conflict with the federal constitution.⁷ But one who takes from the importer, and duly forecloses, a mortgage on a cask of spirituous liquors, which is in the United States warehouse in bond, and who pays the duties and receives the property, does not thereby become the importer, in such sense as to be exempt from the state law.⁸ In some states, all sales of liquor are presumed to be illegal, and the burden of proof was placed upon a party who claimed that such liquor was sold in the original package as imported.⁹ So much, it is believed, is entirely within the constitutional power of the state. But the purpose or intention of the importer, in making a sale, would seem to be of no consequence, when the act of sale was fully protected by the federal law. Accordingly it was held that his sale was legal and valid, although he knew that the purchaser intended to resell the liquor in violation of law.¹⁰ This doctrine, however, did not pass entirely without question. In Maine, it was ruled that imported foreign liquors were liable to seizure and forfeiture under the state law, while the importer retained possession of the same in the original package, if for the purpose and with the intent to break the package, and sell the liquors within the state at retail.¹¹

But so far as concerns the sale of imported foreign liquors, the restriction upon the *power* of the states was taken away by the "Wil-

⁶ State v. Peckham, 3 R. I. 289.

⁷ Cook v. Pennsylvania, 97 U. S. 566.

⁸ King v. McEvoy, 4 Allen. 110.

⁹ Carlton v. Bailey, 27 N. H. 230.

¹⁰ Richards v. Woodward, 113 Mass. 285.

¹¹ State v. Blackwell, 65 Me. 556. In this case Virgin, J., said: "A sale in the original package only being author-

ized by the federal statute, the breaking and selling in a less quantity is without that authority, and is within the prohibition of the state law; and a *fixed intent* that the package shall be broken and sold must place the liquors in the same category. It would hardly be considered reasonable that the federal law should protect property until

son Act" of congress, to be presently noticed, which, by its title, is intended to "limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases," and which makes all intoxicating liquors transported into any state or territory subject to the operation and effect of its laws. So that, at the present time, liquors imported from abroad, and remaining in the importer's hands in the original packages, cannot be sold in any state, except by the persons and in the manner authorized by its statutes, unless where such statutes make an exception in favor of goods in that condition.

§ 69. The Decision in the License Cases.

The rule established in the leading case to which we have referred, applied, in view of the facts of that case, only to goods imported from foreign countries. But congress also has power to regulate commerce among the several states. The question was therefore presented whether the importer of property from one state into another enjoyed the same immunity as the importer of foreign articles, or at what point the police regulations of a state might attach to goods coming into its borders from a sister state. Notwithstanding a *dictum* of Chief Justice Marshall to the effect that the same principles should apply to both cases,¹² this question was regarded as remaining open until the decision of the *License Cases* in 1847. Of the group of three cases heard and decided together and reported under this name, two were merely in affirmance of rules already settled. The one which is of importance for our present purpose is the case of *Pierce v. New Hampshire*.¹³ In this controversy the inquiry was as to the constitutionality of a law of New Hampshire, prohibiting the sale of liquor without license, in its application to a case where the article sold was a barrel of American gin, purchased in Boston, and carried coastwise to a landing in New

an actual unauthorized sale were completed, when the intent to make such a sale is avowed. Such 'aid and comfort' to violators of the internal regulations of a state is not within the

spirit of the regulations of foreign commerce."

¹² *Brown v. Maryland*, 12 Wheat. 419, 449.

¹³ 5 How. 504.

Hampshire, and there sold by the importer in the same barrel. It was adjudged that the state law might validly apply to a sale under these circumstances, and that, in such application, it was not inconsistent with the provisions of the federal constitution. The grounds of this decision were summed up by Chief Justice Taney, in his opinion in the case, as follows: "Upon the whole, the law of New Hampshire is in my judgment a valid one. For although the gin sold was an import from another state, and congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several states, yet, as congress has made no regulation on this subject, the traffic in the article may be lawfully regulated by the state as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or a sale altogether prohibited, according to the policy which the state may suppose to be its interest or duty to pursue."¹⁴

It should be observed that, in this decision, the learned judges carefully pointed out that the conclusions reached were not inconsistent with the rule in *Brown v. Maryland*, and fully explained the ground of the distinction. That ground was, that the earlier case involved an article of *foreign* commerce, on which congress had already legislated, authorizing its importation, while the theory of the decision in the case at bar was that, so far as concerned *interstate* commerce, congress had not yet acted, and, in its silence, the states were at liberty to make regulations not repugnant to any existing law or treaty. Thus the Chief Justice, at page 578, observes: "The present case differs from *Brown v. Maryland* in this, that the former [latter] was one arising out of commerce with foreign nations, which congress had regulated by law, whereas the present is a case of commerce between two states, in relation to which congress has not exercised its power." And Mr. Justice McLean, at page 595, expresses himself as follows: "Neither the facts nor the reasons of that case apply to a person who transports an article from one state to another. In some cases the transportation is only made a few feet or rods, and generally it is attended with little risk, and no duty

¹⁴ License Cases, 5 How. 504, 586.

is paid to the federal or state government. And why should property, when conveyed over a state line, be exempt from taxation which is common to all other property in the state? There is no act of congress to which the license law, as applied to this case, can be held repugnant. And the general power in congress 'to regulate commerce among the several states,' under the restrictions in the constitution, cannot affect the validity of the law. The constitution prohibits import duties on a commercial interchange of commodities between the states. The tax in the form of a license, as here presented, counteracts no policy of the federal government, is repugnant to no power it can exercise, and is imposed by the exercise of an undoubted power in the state. The license system is a police regulation, and, as modified in the state of New Hampshire, was designed to restrain and prevent immoral indulgences, and to advance the moral and physical welfare of society. The owner of the property, who purchased it in Massachusetts and transported it to New Hampshire, is not an importer in the sense in which that term is used in the case of *Brown v. Maryland*. And there is nothing in the general reasoning of that case, or in the facts, which can bring into doubt the constitutionality of the New Hampshire law."

§ 70. Interstate Commerce and the Police Power.

The decision rendered in the *License Cases* was accepted as a correct exposition of the constitutional principle involved, and was acted upon without question or demurrer for many years. It came to be the settled doctrine of the states that intoxicating liquors transported from one state into another were subject to the laws of the latter state relating to their sale, to the same extent as any other intoxicating liquors already rightfully within the state, and could not be sold at the place of destination, either in the original packages or other form, except as the laws of the state might prescribe; and that the police power of the state, so exercised, did not infringe on the power delegated to congress to regulate interstate commerce.¹⁵ It was the

¹⁵ *State v. Fulker*, 43 Kans. 237, 22 Pac. 181, 41 N. W. Rep. 571; *Grusendorf v. Rep.* 1020; *Collins v. Hills*, 77 Iowa, 187, 41 N. W. Rep. 573;

theory that laws passed by the individual states, under their general authority over internal concerns, might incidentally affect foreign and interstate commerce, without conflicting with the federal constitution, provided they did not discriminate against such commerce, and were not inconsistent with the legislation of congress.¹⁶

§ 71. Importation from Another State—*Bowman v. Railway.*

In 1888 the United States supreme court was called upon to consider the validity of a law of Iowa forbidding any common carrier to bring within the state, for any person or persons or corporation, any liquor from any other state or territory, without first having been furnished with a certificate under the seal of the county auditor of the county to which such liquor was to be transported, or was consigned for transportation, certifying that the consignee was authorized to sell liquor in such county. This statute was held unconstitutional as an attempt to regulate interstate commerce.¹⁷ The ground of this decision was that the transportation of freight or of the subjects of commerce, for the purpose of exchange or sale, is beyond all question a constituent of commerce itself. It was explained that where state laws alleged to have been regulations of commerce among the states were sustained, they were laws which related to bridges or dams across streams, wholly within the state, or police or health laws, or to subjects of a kindred nature, not strictly of commercial regulation. But the transportation of passengers or of merchandise from one state to another is in its nature national, admitting of but one regulating power; and it was to guard against the possibility of commercial embarrassments, which would result if one state could directly or indirectly tax persons or property passing through it, or prohibit particular property from entrance

Leisy v. Hardin, 78 Iowa, 286, 43 N. W. Rep. 188; *State v. Zimmerman*, 78 Iowa, 614, 43 N. W. Rep. 458; *State v. Bowman*, 79 Iowa, 566, 44 N. W. Rep. 818.

¹⁶ *State v. Newton*, 50 N. J. Law, 534, 14 Atl. Rep. 604.

¹⁷ *Bowman v. Chicago & N. W. Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, *Waite, C. J., and Harlan and Gray, JJ., dissenting.*

into the state, that the power of regulating commerce among the states was conferred upon the federal government. This decision concerned itself only with the right of interstate transportation. And the question as to the right of the consignee, after such transportation had brought the goods to his hands, to sell the same in the original packages, was in terms reserved. Moreover, it was strongly intimated that the rule now announced was not inconsistent with the doctrine in the *License Cases*, but related to an essentially distinct matter. Nevertheless, it was an unmistakable indication of the direction in which the court was tending, and foreshadowed the decision, soon thereafter to be made, in which the *License Cases* were overruled, and which followed from it almost as a logical necessity. It was of course accepted by the state courts as authoritative, and laws similar to that of Iowa were in other states pronounced invalid.¹⁸ But another consequence followed. The liquor-dealers, never slow to make an ell out of an inch of legal concession, found a means of turning the new decision to their advantage. It was not long before a case arose in Iowa in which it appeared that a railroad company, receiving packages of liquor consigned by a person without the state to a person within it, was assisting the consignee in carrying on his business of selling whisky, by holding the various packages for from six to fifteen days after their arrival, without attempting to collect the freight-bills, each of which was only a few cents, and allowing them to be taken away separately by the consignee, when the charge on each package was collected. But the courts put an end to this practice, by holding that the company, after such a lapse of time, was no longer a carrier, but became a warehouseman; that the liquors then lost their character as articles of interstate commerce, and, if intended for illegal sale, might be seized in the freight depot and confiscated, under the law of the state; and that the company's complicity in the illegal design would prevent it from setting up its lien for unpaid charges to defeat the seizure and condemnation.¹⁹

¹⁸ State v. Stilsing, 52 N. J. Law, 517,
20 Atl. Rep. 65.

¹⁹ State v. Creeden, 78 Iowa, 556, 43

N. W. Rep. 673. In this case Beck, J., observed: "A carrier is a servant of commerce, and is protected under con-

§ 72. The "Original Package" Decision.

Two years after the decision of the United States supreme court adverted to in the preceding section, (that is, in 1890,) the same tribunal was brought again to the consideration of state liquor laws in connection with the regulation of commerce. And a decision was promulgated which, although it followed logically in the line set by the latest rulings of the court, was received by the country with no little surprise, inasmuch as it overruled the *License Cases*, and thereby destroyed a doctrine regarded as settled for nearly half a century, and which was followed by such important and far-reaching results as to demand the interposition of congress. We refer to the case of *Leisy v. Hardin*,²⁰—popularly known as the "original package decision." This was an action of replevin, for certain kegs and cases of beer, begun in an inferior court of Iowa against a constable, who had seized the property under a search-warrant issued by a justice of the peace, pursuant to a statute of that state, which prohibits the sale, the keeping for sale, or the manufacture for sale, of any intoxicating liquor (including malt liquor) for any purpose whatever, except for pharmaceutical, medicinal, chemical, or sacramental purposes, and then only under an annual license which may be granted by the district court of the proper county to applicants who are citizens of Iowa and residents of the county, and otherwise qualified. The plaintiffs were citizens and residents of Illinois, engaged as brewers in manufacturing beer in that state, and in selling it in Illinois and

stitutional provisions for the regulation of commerce in the discharge of all the duties of a carrier recognized by the law. Regulations of commerce reach him while he is in the discharge of duties pertaining to commerce. When he ceases to be a carrier he is beyond the protection provided by regulations for commerce. If he ceases to be a carrier and becomes a warehouseman, he cannot be protected as a carrier. But counsel for defendant say that the goods became impressed with the character of interstate commerce, and re-

tained that character after they went into the custody of the warehouseman. In truth, commerce, so far as transportation is concerned, ceased to have connection with the liquors when they ceased to be held by the carrier for transportation. After that they were held for storage. It surely will not be contended that the storage of goods was a continuation of the transportation. They were stored because the transportation had ceased."

²⁰ 135 U. S. 100, 10 Sup. Ct. Rep. 681.

Iowa. The beer in question was made by them in Illinois, and there put up by them in said kegs and cases, each keg being sealed and stamped, and each case being substantially made of wood and sealed with a metallic seal which had to be broken in order to open the case. These kegs and cases were sent by plaintiffs to a point in Iowa, and there sold and offered for sale by their agent, in a building owned by one of them, and without breaking or opening the kegs or cases. The plaintiffs claimed protection under the federal constitution. But the courts in Iowa gave judgment for the defendant. The case being carried by writ of error to the United States supreme court, it was there held, by a majority of that court, that the statute in question²¹ was unconstitutional and void in so far as it prohibited the sale of liquors by a foreign or non-resident importer in the packages in which they were brought from another state, being in conflict with that provision of the federal constitution which vests in congress the power to regulate commerce among the several states.

The opinion of the majority was delivered by Mr. Chief Justice Fuller, who, after stating in general terms the nature and scope of the power to regulate interstate commerce, observed: "Whenever a particular power of the general government is one which must necessarily be exercised by it, and congress remains silent, this is not only not a concession that the powers reserved by the states may be exerted as if the specific power had not been elsewhere reposed, but on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the states cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammelled. That ardent spirits, distilled liquors, ale, and beer are subjects of exchange, barter,

²¹ Laws Iowa 1888, c. 71, repealing § 1524 of the Code of Iowa, which allowed importers of foreign liquors to sell the same in the original packages in which they were imported.

and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of congress, and the decisions of courts, is not denied. Being thus articles of commerce, can a state, in the absence of legislation on the part of congress, prohibit their importation from abroad or from a sister state? or, when imported, prohibit their sale by the importer? If the importation cannot be prohibited without the consent of congress, when does property imported from abroad, or from a sister state, so become part of the common mass of property within a state as to be subject to its unimpeded control?" Referring next to one of the earliest decisions on the subject,²² the learned chief justice remarked that it was therein laid down "that the point of time when the prohibition ceases, and the power of the state to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property, and a tax which finds the article already incorporated with that mass by the act of the importer; that, as to the power to regulate commerce, none of the evils which proceeded from the feebleness of the federal government contributed more to the great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by congress; that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states; that that power was complete in itself, acknowledged no limitations other than those prescribed by the constitution, was co-extensive with the subject on which it acts, and not to be stopped at the external boundary of a state, but must be capable of entering its interior; that the right to sell any article imported was an inseparable incident to the right to import it; and that the principles expounded in the case applied equally to importations from a sister state." It was next admitted

²² *Brown v. Maryland*, 12 Wheat. 419.

that the precise question before the court had not been ruled in the earlier cases referred to, but "we think it was virtually involved and answered, and that this is demonstrated, among other cases, in *Bowman v. Railway Co.*"²³ In that decision, "while the determination of whether the right of transportation of an article of commerce from one state to another includes by necessary implication the right of the consignee to sell it in unbroken packages at the place where the transportation terminates was in terms reserved, yet the argument of the majority conducts irresistibly to that conclusion." Here the learned chief justice proceeded to review the case mentioned at some length, stating its doctrine and reasoning, and then adverted to the decision in *Pierce v. New Hampshire*.²⁴ "In that case," he said, "the defendants had been fined for selling a barrel of gin in New Hampshire which they had bought in Boston, and brought coastwise to Portsmouth, and there sold in the same barrel and in the same condition in which it was purchased in Massachusetts, but contrary to the law of New Hampshire in that behalf. The conclusion of the opinion of Mr. Chief Justice Taney is in these words: 'Upon the whole, therefore, the law of New Hampshire is in my judgment a valid one; for although the gin sold was an import from another state, and congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several states, yet, as congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the state as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the state may suppose to be its interest or duty to pursue.' . . . But conceding the weight properly to be ascribed to the judicial utterances of this eminent jurist, we are constrained to say that the distinction between subjects in respect of which there can be of necessity only one system or plan of regulation for the whole country, and subjects local in their nature, and, so far as relating to commerce, mere aids, rather than regulations, does not appear to us to have been sufficiently recognized by him in arriving at

²³ 125 U. S. 465, 8 Sup. Ct. Rep. 869, ²⁴ 5 How. 504.
1062.

the conclusions announced. That distinction has been settled by repeated decisions of this court, and can no longer be regarded as open to re-examination. After all, it amounts to no more than drawing the line between the exercise of power over commerce with foreign nations and among the states and the exercise of power over purely local commerce and local concerns. The authority of *Pierce v. New Hampshire*, in so far as it rests on the view that the law of New Hampshire was valid because congress had made no regulation on the subject, must be regarded as having been distinctly overthrown by the numerous cases hereinafter referred to. The doctrine now firmly established is, as stated by Mr. Justice Field, in *Bowman v. Railway Co.*,²⁵ 'that where the subject upon which congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers, and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the state can act until congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state into another, congress can alone act upon it and provide the needed regulations. The absence of any law of congress upon the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the states shall be unrestricted. It is only after the importation is completed, and the property imported is mingled with and becomes a part of the general property of the state, that its regulations can act upon it, except in so far as may be necessary to insure safety in the disposition of the import until thus mingled.' The conclusion follows that, as the grant of the power to regulate commerce among the states, so

²⁵ 125 U. S. 465, 507, 8 Sup. Ct. Rep. 869, 1062.

far as one system is required, is exclusive, the states cannot exercise that power without the assent of congress, and, in the absence of legislation, it is left for the courts to determine when state action does or does not amount to such exercise; or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end. Illustrations exemplifying the general rule are numerous." Hereupon the court proceeded to cite, in more or less detail, the authorities which we have collected in the margin,²⁶ and then continued as follows: "The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer which they sell in original packages, as described. Under our decision in *Bowman v. Railway Co.*, *supra*, they had the right to import this beer into that state, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the state. Up to that point of time, we hold that, in the absence of congressional permission to do so, the state had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer."

It must be added, however, that the force of this decision, as an authority on the general subject, was much weakened by an extremely able and cogently reasoned dissenting opinion, written by Mr. Justice Gray, and concurred in by Messrs. Justices Harlan and Brewer. Their disagreement from the opinion of the majority was based mainly upon three grounds. First, that the decision in the *License*

²⁶ State Freight Tax, 15 Wall. 232; Henderson v. Mayor, 92 U. S. 259; Railroad Co. v. Husen, 95 U. S. 465; Cook v. Pennsylvania, 97 U. S. 566; Railway Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. Rep. 4; Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. Rep. 592; County of Mobile v. Kimball, 103 U. S. 691; Escanaba Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. Rep. 185; Transportation Co. v. Parkersburg, 107 U. S. 691, 2 Sup. Ct. Rep. 732; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. Rep. 1091; Morgan's S. S. Co. v. Board of Health, 118 U. S. 455, 6 Sup. Ct. Rep. 1114; Smith v. Alabama,

124 U. S. 465, 8 Sup. Ct. Rep. 564; Railway Co. v. Alabama, 128 U. S. 96, 9 Sup. Ct. Rep. 28; Kimmish v. Ball, 129 U. S. 217, 9 Sup. Ct. Rep. 277; Welton v. Missouri, 91 U. S. 275; Walling v. Michigan, 116 U. S. 446, 6 Sup. Ct. Rep. 454; Patterson v. Kentucky, 97 U. S. 501; Webber v. Virginia, 103 U. S. 344; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273; Bartemeyer v. Iowa, 18 Wall. 129; Beer Co. v. Massachusetts, 97 U. S. 25; Foster v. Kansas, 112 U. S. 201, 5 Sup. Ct. Rep. 8; Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. Rep. 6.

Cases was not only right in itself, but sound and impregnable in its determination of the constitutional questions involved; that it had never been overruled, but, on the contrary, was the starting-point of a consistent and interwoven chain of decisions reaching from that day to this; and that its authority was directly in point, as to the case at bar, and practically decisive of it. Second, that the power to regulate or prohibit the manufacture or sale of intoxicating liquors appropriately belongs, as a branch of the police power, to the legislatures of the several states, and can be judiciously and effectively exercised by them alone, according to their views of public policy and local needs, and cannot practically, if it can constitutionally, be wielded by congress as part of a national and uniform system. Third, that the practical operation of the view held by the majority would be disastrous to the efforts of the various states to suppress or discourage the traffic in liquors, since a constant supply could be poured from one state into another, in "packages" of any size or description, and there sold, in defiance of state law, under the protection of the constitution as thus interpreted.

§ 73. Cases Following *Leisy v. Hardin*.

The doctrine thus established by the supreme federal tribunal was of course accepted as authoritative by the state courts, and the rule was speedily established that an importer of intoxicating liquors, into any state from any other state or country, could, by himself or agent, sell such liquors so long as they remained in the unbroken packages in which they existed during their transportation, without regard to any laws of the state into which such liquors were imported.²⁷ In Massachusetts, where liquor was shipped by non-residents to their agent in Boston, under a contract which he had made for its sale, and of which he had notified them, and the agent, upon its arrival, caused the liquor to be delivered to the purchasers in the original packages in which it was shipped, it was held that an action was maintainable for the price, although the importer did not have the

²⁷ *State v. Winters*, 44 Kans. 723, 25 46 N. W. Rep. 1063; *State v. Coonan*, Pac. Rep. 235; *State v. Pfeleagor*, (Iowa,) (Iowa,) 48 N. W. Rep. 921.

license to sell required by law.²⁸ So where an original package of intoxicating liquors was transported by rail from another state, and upon being unloaded upon the depot platform, and before delivery to the consignee, was seized under a search-warrant, it was held that the shipment was a lawful act of interstate commerce, and the liquors were not liable to seizure under the state laws.²⁹ The jurisdiction of the federal courts was also invoked by persons who were seeking to take advantage of the privilege thus secured to them, and who found themselves interfered with by attempts to enforce the existing state laws against them. And those courts decided that they had the power to enjoin proceedings by a prosecuting attorney to prevent the agents of a non-resident importer from selling liquors in the original packages of importation.³⁰ Interesting questions also arose as to the power of the federal courts to release persons so circumstanced, from arrest under state laws, on *habeas corpus*. In one case, the petitioner had been arrested for a violation of the liquor laws of Pennsylvania and committed for trial. He was brought before the federal court on *habeas corpus*, and, at the hearing, undertook to show that the sale of liquor charged against him as a criminal offense was a sale made by him as the agent of an Ohio brewing company, and the liquor in question was manufactured by said company in Ohio, and imported into Pennsylvania, and there sold in the original and unbroken packages, and he alleged these facts as ground for his discharge from custody. But the court (Acheson, J.) pointed out that the constitutionality of the laws of Pennsylvania brought in question, as they affected interstate commerce, could be tested by the prisoner upon his trial in the state court, and his defense there made, and added: "It is not to be doubted that that court will recognize the binding force upon all judicial tribunals, federal and state, of the decisions of the supreme court of the United States in the cases of *Leisy v. Hardin*³¹ and *Lyng v. Michigan*,³² and give to him the full

²⁸ *Carstairs v. O'Donnell*, (Mass.) 28 N. E. Rep. 271.

²⁹ *State v. Carrick*, (Iowa,) 48 N. W. Rep. 808; *State v. Intoxicating Liquors*, (Me.) 21 Atl. Rep. 840. Compare *Lemp v. Fullerton*, (Iowa,) 48 N. W. Rep. 1034.

³⁰ *Schandler Bottling Co. v. Welch*, 42 Fed. Rep. 561; *Tuchman v. Welch*, Id. 548. See *Woolstein v. Welch*, Id. 566.

³¹ 135 U. S. 100, 10 Sup. Ct. Rep. 681.

³² 135 U. S. 161, 10 Sup. Ct. Rep. 725.

benefit of those decisions." The application was therefore refused.³³ But in a case in the federal circuit court for the district of Kansas, where the facts were almost precisely similar, Caldwell, J., discharged the eleven persons who had petitioned that court for relief on *habeas corpus*, holding that as they had a right, under the constitution as interpreted by the supreme court, to make the sales for which they were arrested, any imprisonment of them for doing that act was, in the language of the *habeas corpus* act, "in violation of the constitution of the United States," and illegal, and that the court had jurisdiction, and was bound, to discharge any person so illegally held in custody.³⁴

§ 74. Effects of this Decision.

The decision in the case of *Leisy v. Hardin*—that the state of the law was such as to allow importers to sell in original packages without regard to the laws of the state—was followed by immediate, widespread, and most pernicious results. Its effect, as had been foreseen by some of the judges, was to practically annul the efforts of certain of the states to suppress the traffic in intoxicating liquors. The brewers and distillers, recognizing the extent of the protection afforded to them by this construction of the law, hastened to establish depots and agencies in states foreign to their own, and especially those where prohibition or stringent licensing provisions were in force, and there offered for sale their products in barrels, kegs, cases, and even small bottles. Several portions of the country, where the greatest advances towards the entire suppression of the traffic had previously been made, were at once populated with "original package saloons," and thereby deluged with intoxicants, and the officers of the law found their energies paralyzed by the claim of immunity under the constitution. Various appeals were made to the courts to remedy these gross abuses, and they exerted their jurisdiction to do what was possible towards checking the obnoxious traffic. In the first place, they recognized and announced the fact that although the state statutes, regulating the sale of liquor, might be so general in their terms as to cover sales

³³ *United States v. Fiscus*, 42 Fed. Rep. 395.

³⁴ *In re Beine*, 42 Fed. Rep. 545.

in the original packages of importation, and therefore, under the decision of the supreme court, would be in contravention of the constitution, yet that decision did not render them *wholly* null and void, but they were still valid and operative in their application to all other sales.³⁵ Next the courts were vigilant to restrict the privilege of selling in original imported packages to such persons as were honestly and in good faith entitled to it. It was held that when a sale of intoxicating liquors was admitted or proved to have been made by defendants, before they could avail themselves of the protection afforded by the interstate commerce clause and its recent interpretation, they must show (1) that they were foreign importers or the agents of a foreign importer; (2) that as such importers or agents they received an importation of liquors from another state or a foreign country; (3) that they were, as such importers or agents, selling this importation by the original unbroken package in which it was imported; (4) that they were not making their house of business a tipling concern for the rendezvous of persons, bringing it within the police power of the state to declare it a nuisance.³⁶ Where they claimed to be agents of foreign importers, the *bona fides* of their agency was considered a question to be referred to the jury.³⁷ And where, in such a case, the defendant failed to produce any contract of agency, or the testimony of the importer, or any other evidence of the alleged agency, it was held that the jury were justified in finding that the defense was not set up in good faith.³⁸ The courts did not feel justified in taking the *size* of the package as any criterion of the lawfulness of its sale.³⁹ But they insisted that it could be sold only in the form and shape in which it was imported. For instance, a sale of liquor by the bottle, by one who imported such bottles of liquor in boxes with closed tops, which were broken open, was adjudged unlawful.⁴⁰ Finally, it was held that the state laws prohibiting the

³⁵ State v. Kibling, (Vt.) 22 Atl. Rep. 613; Comm. v. Gagne, (Mass.) 26 N. E. Rep. 449.

³⁶ State v. Chapman, (S. Dak.) 47 N. W. Rep. 411.

³⁷ Comm. v. Bishman, 133 Pa. St. 639, 21 Atl. Rep. 12.

³⁸ Comm. v. Pendergast, 138 Pa. St. 633, 21 Atl. Rep. 12.

³⁹ *In re Beine*, 42 Fed. Rep. 545.

⁴⁰ Smith v. State, (Ark.) 15 S. W. Rep. 892.

sale of liquor to minors and habitual drunkards were applicable to sales in original packages by the importer; such a construction, it was thought, did not render such laws an interference with interstate commerce.⁴¹

§ 75. What Constitutes an Original Package.

As many unscrupulous persons sought to take an improper advantage of the existing state of the law, the vigilance of the state authorities was often successful in detecting and punishing frauds and evasions, especially where the article was sold in such a shape that it could not strictly be considered an "original package." As already stated, the courts were unwilling to say that the size of the package had anything to do with the question of its protection under federal law. In a case where boxes containing a single bottle of liquor were shipped singly and separately as so many distinct packages it was said: "It is not perceived why, in the absence of a regulation by congress to the contrary, the importer may not determine for himself the form and size of the packages he puts up for export. The idea that small packages of liquor cannot be treated as original packages, because they are small, springs from the conviction back of it that liquor in any form, or in any sized package, is not a legitimate subject of commerce. That question is put at rest by the decision of the United States supreme court, until congress shall act. As long as packages of liquor in any form or size may lawfully be sold by the importer or his agent in a prohibition state, the size of the package is not of much consequence."⁴² But in several cases, where bottles of whisky or beer were each sealed up in a paper wrapper, and closely packed together in uncovered wooden boxes furnished by the importer, and these wooden boxes were marked to the address of agents, and shipped from one state to another, it was held that the wooden boxes, and not the bottles, constituted the original packages.⁴³

⁴¹ Comm. v. Zelt, 138 Pa. St. 615, 21 Atl. Rep. 7; Comm. v. Silverman, 138 Pa. St. 642, 21 Atl. Rep. 13.

⁴² *In re Beine*, 42 Fed. Rep. 545.

⁴³ *Keith v. State*, (Ala.) 8 South. Rep. 353; *Harrison v. State*, (Ala.) 10 South.

Rep. 30; *State v. Chapman*, (S. Dak.) 47 N. W. Rep. 411; *In re Harmon*, 43 Fed. Rep. 372; *Allen v. Black*, Id. 228; *Comm. v. Swihart*, 138 Pa. St. 629, 21 Atl. Rep. 11.

But where the boxes were furnished by the carrier, and fastened to the car, so as virtually to become a part of it, the bottles separately wrapped and directed were considered the original packages.⁴⁴

§ 76. Enactment of the Wilson Law.

Neither the courts of justice nor the other state authorities had power effectively to remedy the gross abuses above described. But it had been strongly hinted by the supreme court that relief might be sought in the halls of congress. Application was therefore made in that quarter and with such wide-spread and genuine impor-tunity that congress was moved to activity, and enacted a statute, commonly called the "Wilson law," directed against the evils com-plain-ed of, which was approved August 8th, 1890,—within four months of the decision of the supreme court which brought about this state of affairs. Its terms are as follows: "That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such state or territory be sub-ject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been pro-duced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or other-wise."⁴⁵

§ 77. Constitutionality of Wilson Law.

The constitutionality of the statute recited in the preceding sec-tion was assailed, soon after its enactment, on the ground that,

⁴⁴Keith v. State, (Ala.) 8 South. Rep. 353. In a case in Iowa it was held that a person who keeps a saloon with bar and fixtures, receives as original packages bottles of beer and whisky, and sells the same over his bar to cus-tomers who destroy the seals or wire on the bottles, pull the corks, pour the

contents into glasses on the bar, drink the same, and leave the bottles on the bar, is a seller of the contents of origi-nal packages, and not the original packages themselves. Hopkins v. Lew-is, (Iowa,) 51 N. W. Rep. 255.

⁴⁵Acts of 51st Congr., 1st Sess., c. 728, p. 313.

instead of being an exercise by congress of its power to regulate interstate commerce, it was an unlawful delegation of that power to the several states. This contention, however, was not sustained by the courts. It was held that the act in question simply defines the time when imported liquors shall become subject to state control, and gives no authority to the states to legislate upon commerce. Thus it was said: "The act declares that intoxicating liquors shall, upon arrival in the state or territory, be subject to the operation of the police powers of the state. In the exercise of the constitutional power to regulate foreign and interstate commerce, congress has declared when such imported property shall become subject to the state laws. The states are not authorized to declare when such importations shall become subject to state control, nor can the states in any manner change or affect the enactment made by congress upon that subject. Congress can at any time change or abrogate the enactment in question, and it is clearly a constitutional exercise of the power conferred upon congress. It is apparent to every one that at some time, or upon the happening of some event, imported property loses that character and becomes subject to the laws of the state, and it is for congress, which possesses the power to regulate commerce, to define the time or event which shall have the effect of subjecting importations to state control, and this is what is done by the Wilson bill in regard to intoxicating liquors."⁴⁶ In course of time this question came before the supreme court of the United States, and it was there held that the commercial clause in the constitution did not guaranty the absolute freedom of interstate commerce, and therefore the statute in question was not an unconstitutional restriction upon it. And further, that the effect of the act was to subject to the police power of the state certain subjects which theretofore were excluded from its operation by reason of their being articles of interstate commerce, and that the act was not a delegation to the states of the power to regulate commerce, nor an adoption of state laws as such regulation.⁴⁷

⁴⁶ *In re Spickler*, 43 Fed. Rep. 653; *In re Van Vliet*, Id. 761; *State v. Fraser*, (N. Dak.) 48 N. W. Rep. 343.

⁴⁷ *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. Rep. 865.

§ 78. Operation and Effect of Wilson Law.

There was another question which arose in connection with the Wilson law, and which, for a time, threatened to cause very serious difficulty. This was the question whether its effect was to subject imported liquors immediately to the existing state laws, or whether additional legislation by the states was needed to effect its purpose. A decision was rendered by one of the federal circuit courts that the act was permissive only, and not mandatory upon the states; that the previous state laws, in their application to imported liquors, were absolutely void by reason of their unconstitutionality, and could not be brought to life by the subsequent removal of the restriction; that in effect, therefore, at the time of the passage of the Wilson bill, there was no law in any state to prohibit the sale of imported liquors in the original packages; and that, unless and until such a law were enacted in any given state, such sales might continue with impunity.⁴⁸ This ruling, however, was not generally approved by either the federal or state courts. On the contrary, the other decisions were all to the effect that, immediately upon the passage of the act of congress, the existing state laws took effect upon that class of articles from which they were before excluded, and required no re-enactment.⁴⁹ Still, the doubt raised was sufficiently serious to cause much anxiety in several quarters. And it is on record that one state—Vermont—actually went so far as to re-adopt all her previous liquor legislation by a general re-enacting statute.⁵⁰ But when the decision which had occasioned

⁴⁸ *In re Rahrer*, 43 Fed. Rep. 556, Phillips and Foster, JJ.

⁴⁹ *In re Spickler*, 43 Fed. 653; *In re Van Vliet*, Id. 761; *Comm. v. Calhane*, (Mass.) 27 N. E. Rep. 881; *State v. Fraser*, (N. Dak.) 48 N. W. Rep. 343.

⁵⁰ Acts Vt. 1890, No. 40. This act, the re-enacting statute, was expressed in the following terms: "Whereas doubts have been suggested as to the validity of the statutes of this state heretofore enacted relating to intoxicating liquors or liquids, as applied to such liquors or

liquids when brought into the state under certain circumstances; and whereas it is expedient that the due administration of justice be not hindered, delayed, or thwarted by such doubts; therefore it is hereby enacted by the general assembly of the state of Vermont: Section 1. That the statutes of this state heretofore enacted, and which have not been repealed, and each and every part of the same, relating to the subject of intoxicating liquors or liquids, or offenses or proceedings having

the doubt came before the supreme federal tribunal, it was there reversed, and the question was finally put at rest. It was held that the decision in the "original package case" did not have the effect to annul the state laws, or make them absolutely void, and consequently their re-enactment was not necessary in order to make them immediately operative upon imported liquors after the passage of the Wilson act.⁵¹ Some question was also made as to whether the act of congress withdrew federal obstruction to the operation of state laws in respect to liquors in original packages which were in the state at the time of its passage, or only with respect to such liquors as should thereafter be imported. But it was held that "the terms of the enactment clearly enforce the former view, and limit the effect of the regulations of commerce between the states so as to admit of the operation of state regulations of the liquor traffic upon liquids and liquors in original packages which were in the state at the time of the passage of the act, as well as upon subsequent importations. The withdrawal

relation to any such liquors or liquids, be, and the same are hereby, re-enacted, and are hereby declared to be of and to have full force and effect to every intent and purpose, in the same manner and with the same effect as if each and every such statute were herein repeated and set forth in detail."

⁵¹ *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. Rep. 865. In regard to the point mentioned, Fuller, C. J., observed: "It is said that by the decision in *Leisy v. Hardin*, [135 U. S. 100, 10 Sup. Ct. Rep. 681,] similar state laws were held unconstitutional in so far as they prohibited the sale of liquors by the importer in the condition in which they had been imported. . . . This was far from holding that the statutes in question were absolutely void, in whole or in part, and as if they had never been enacted. On the contrary, the decision did not annul the law, but limited its operation to property strictly within the jurisdiction of the state. . . . Congress did not use terms of permission to the state to act, but simply re-

moved an impediment to the enforcement of the state law in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction. . . . This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to congress, but of a law which it was competent for the state to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of congress. That act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a re-enactment of the state law was required before it could have the effect upon imported, which it had always had upon domestic, property. Jurisdiction attached, not in virtue of the law of congress, but because the effect of the latter was to place the property where jurisdiction could attach."

of federal regulations applies to all liquors 'transported'—not such only as shall be transported—'into the state, or remaining therein for use,' etc."⁵²

§ 79. Discrimination against Citizens and Products of Other States.

We have already had occasion to examine into the validity of state liquor laws which made discriminations against the products or the citizens of other states. In an earlier section it was shown that a discrimination against goods coming from a sister state—as where the statute permits the sale of wine made from grapes grown within the state, but prohibits the sale of that coming from abroad—is not defensible as a police regulation, but is an unconstitutional restriction upon interstate commerce; and that the same objection applies, with equal force, to the case of a tax imposed by a state statute upon a business or occupation, which necessarily discriminates against the introduction and sale of the products of another state or against its citizens.⁵³ The latest rulings of the United States supreme court are in affirmance of these principles.⁵⁴

⁵² *Tinker v. State*, (Ala.) 8 South. Rep. 814.

⁵⁴ *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. Rep. 725.

⁵³ *Supra*, § 44, and cases cited.

CHAPTER V.

PROHIBITION.

- § 80. Nature and Terms of Prohibitory Laws.
- 81. Constitutionality of Prohibition.
- 82. Abridgment of Rights of Citizenship.
- 83. Taking Property without Due Process of Law.
- 84. Impairing the Obligation of Contracts.
- 85. Retrospective Effect of Prohibition.
- 86. Regulation of Commerce.
- 87. Conflict with United States Revenue Laws.
- 88. Adoption of Constitutional Amendment.
- 89. Property in Liquors under Prohibitory Laws.
- 90. Repeal of Prior Laws by Adoption of Prohibition.

§ 80. Nature and Terms of Prohibitory Laws.

The system of liquor legislation known as "prohibition," now in force in several of the states, is the most stringent and severe of the various statutory plans by which it has been attempted to suppress the evils of intemperance. Instead of merely regulating or restricting the sale and drinking of intoxicants, it professes to banish them entirely from the state, save for a few indispensable purposes. It makes intoxicating liquor an outlaw, and the sale or furnishing of it by one man to another a crime. To this end, a prohibitory law commonly provides that no person within the state shall manufacture, keep for sale, sell, give, or furnish to another any intoxicating liquor. This is subject to the proviso that licensed druggists and town agents may sell for certain uses, generally specified as "medicinal, mechanical, scientific, and sacramental." And manufacturers' licenses are sometimes granted, under the condition that they may only sell, at wholesale, to such druggists and town agents. To secure the enforcement of these provisions, such acts as the following are made criminal: Sales by unlicensed persons for any purpose, and by holders of permits for any other than the excepted purposes; keeping liquor for illegal sale; maintaining a nuisance in the shape of a house kept for illegal sales of liquor; being a "common seller;" leasing a house to

be used as a liquor shop; advertising the sale of liquor as a beverage. Further to facilitate the enforcement of the law, there are provisions for warrants to search suspected places for contraband liquors and authorizing their seizure and confiscation; provisions for the abatement of nuisances; provisions invalidating contracts for the sale of liquor and authorizing the recovery of money paid under such contracts; and provisions in regard to the evidence on prosecutions under the act, intended to aid in securing convictions. It will thus be seen that the terms of a prohibitory law are of the most drastic character. The system, for greater security against change, has been incorporated into the constitutions of some of the states. In others, it is merely adopted by an act of the legislature.

§ 81. Constitutionality of Prohibition.

It may be stated, in general terms, as well settled by authority, that it is within the power of a state to absolutely prohibit the manufacture and sale, within its borders, of intoxicating liquors as a beverage, either by statute or constitutional enactment, and such prohibition is a lawful exercise of its police power and is not open to constitutional objection, either on considerations of natural right or of the specific limitations of state power.¹ Laws of this character might be invalidated by peculiar and unlawful provisions. Thus, in Indiana, at an early day, a law was held to be unconstitutional which prohibited the manufacture of liquor, except for the government, to be sold by it as a medicine, and forbade its sale or use as a beverage by any private person. It was said that the government invades the faculties of industry possessed by individuals, when it attempts to

¹ License Cases, 5 How. 504; Barte-meyer v. Iowa, 18 Wall. 129; Beer Co. v. Massachusetts, 97 U. S. 25; Foster v. Kansas, 112 U. S. 201, 5 Sup. Ct. Rep. 8; Mugler v. Kansas, 123 U. S. 623, 3 Sup. Ct. Rep. 273; *In re* Brosnahan, 18 Fed. Rep. 62; State v. Bradley, 26 Fed. Rep. 289; Metropolitan Board of Excise v. Barrie, 34 N. Y. 657; People v. Quant, 2 Park. (N. Y.) 410; Perdue v. Ellis, 18 Ga. 586; Anderson v. Comm., 13 Bush,

485; Stickrod v. Comm., 86 Ky. 285, 5 S. W. Rep. 580; State v. Mugler, 29 Kan. 252, 44 Am. Rep. 634; Jones v. People, 14 Ill. 196; Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487; State v. Donehey, 8 Iowa, 396; McLane v. Leicht, 69 Iowa, 401, 29 N. W. Rep. 327; Jordan v. District Court, 74 Iowa, 762, 38 N. W. Rep. 430; Gordon v. State, 46 Ohio St. 607, 23 N. E. Rep. 63; People v. Gallagher, 4 Mich. 244.

appropriate to itself any particular branches of industry or any business which is not of a public and general character.² This decision may very possibly have been right on the particular facts. But, as above stated, the constitutionality of prohibitory laws framed on the lines we have already indicated, is now settled beyond all question. In Ohio, the constitution contains a peculiar provision that "no license to traffic in intoxicating liquors shall hereafter be granted in this state, but the general assembly may, by law, provide against the evils resulting therefrom." This clause, it is held, does not, by implication, prevent the enactment of prohibitory legislation.³ Having asserted the validity of such laws in general terms, we shall now proceed to take up the various arguments which have been urged against their constitutionality, and examine each in detail, in the light of the adjudged cases.

§ 82. Abridgment of Rights of Citizenship.

It has been argued that prohibitory legislation, since it denies to all persons, save the few excepted, the right to engage in the manufacture or sale of intoxicants, is obnoxious to the provision of the fourteenth amendment that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." But this contention is repudiated by the authorities. The liquor traffic is nowhere in this country recognized as a lawful business, except as permitted and regulated by positive law. It is not an avocation which every man has a natural right to pursue. It does not stand on the same level with such occupations as are useful to the community or beneficial to the trade and commerce of the country. On the contrary it is pernicious in its effects, and is properly subject to regulation under the police power. It is in no sense, therefore, a privilege or immunity such as is secured by the constitution.⁴ As remarked by Mr. Justice Miller, "no case has held that

² *Herman v. State*, 8 Ind. 545.

³ *Gordon v. State*, 46 Ohio St. 607, 23 N. E. Rep. 63; *Miller v. State*, 3 Ohio St. 475.

⁴ *In re Hoover*, 30 Fed. Rep. 51; *Bar-*

temeyer v. Iowa, 18 Wall. 129; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. Rep. 13.

such a law was void as violating the privileges or immunities of citizens of a state or of the United States. If, however, such a proposition is seriously urged, we think that the right to sell intoxicating liquors, so far as such a right exists, is not one of the rights growing out of citizenship of the United States, and in this regard the case falls within the principles laid down by this court in the *Slaughter House Cases*, [16 Wall. 36.]"⁵

§ 83. Taking Property without Due Process of Law.

The most serious and weighty objections to the validity of prohibitory legislation have been such as regarded its effect upon rights and property in existence at the time of its enactment. Such a law, as a rule, saves no privileges previously acquired, makes no exception in favor of the disposition of liquor existing in the state at its passage, and although it practically destroys the value of such liquor, as also of breweries and distilleries then in operation, yet provides no compensation for their owners. Yet it is settled, by the immense preponderance of authority, that if a state, by statute or constitutional provision, entirely prohibits the manufacture and sale of intoxicating liquors within its jurisdiction, such enactment is not constitutionally objectionable on the ground of its "depriving" persons affected of their "property without due process of law," notwithstanding its effect may be to destroy a business theretofore lawful, and seriously to impair the value of property held at the time and adapted to the continuance of such business, and that without compensation.⁶ Though some slight doubt of the correctness of this view was

⁵ *Bartemeyer v. Iowa*, 18 Wall. 129, 133.

⁶ *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6; *Tanner v. Alliance*, 29 Fed. Rep. 196; *Weil v. Calhoun*, 25 Fed. Rep. 865; *Kessinger v. Hinkhouse*, 27 Fed. Rep. 883; *Savage v. Comm.*, 84 Va. 582, 5 S. E. Rep. 565; *Menken v. Atlanta*, 78 Ga. 668, 2 S. E. Rep. 559; *Prohibitory Amendment*

Cases, 24 Kans. 700; *Heck v. State*, 44 Ohio St. 536, 9 N. E. Rep. 305; *Moore v. Indianapolis*, 120 Ind. 483, 22 N. E. Rep. 424; *McLane v. Leicht*, 69 Iowa, 401, 29 N. W. Rep. 327; *Kaufman v. Dostal*, 73 Iowa, 691, 36 N. W. Rep. 643; *Drake v. Jordan*, 73 Iowa, 707, 36 N. W. Rep. 653; *Shear v. Bolinger*, 74 Iowa, 757, 37 N. W. Rep. 164; *Cooley*, Const. Lim. 584.

expressed in some of its earlier decisions,⁷ the supreme court of the United States has now explicitly adopted it, and the question must therefore be regarded as finally put at rest.⁸ So stands the law. Yet the application of this rule is sometimes productive of great hard-

⁷ *Bartemeyer v. Iowa*, 18 Wall. 129, 137, per Field, J.

⁸ *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273. In this case the general question presented was, whether the prohibition statutes of Kansas of 1881 and 1883 were in conflict with that clause of the fourteenth amendment which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law." Mr. Justice Harlan, who delivered the opinion of the court, after thus stating the question to be determined, observed: "That legislation by a state prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the constitution of the United States, is made clear by the decisions of this court, rendered before and since the adoption of the fourteenth amendment, to some of which, in view of the questions to be presently considered, it will be well to refer." The learned judge then proceeded to review the *License Cases*, 5 How. 504; *Bartemeyer v. Iowa*, 18 Wall. 129; *Beer Co. v. Massachusetts*, 97 U. S. 25; and *Foster v. Kansas*, 112 U. S. 201, 5 Sup. Ct. Rep. 8, and continued: "It is, however, contended that although the state may prohibit the manufacture of intoxicating liquors for sale or barter within her limits, for general use as a beverage, 'no convention or legislature has the right, under our form of government, to prohibit any citizen from manufacturing for his own use,

or for export or storage, any article of food or drink not endangering or affecting the rights of others.' The argument made in support of the first branch of this proposition, briefly stated, is, that in the implied compact between the state and the citizen, certain rights are reserved by the latter which are guaranteed by the constitutional provision protecting persons against being deprived of life, liberty, or property without due process of law, and with which the state cannot interfere; that among those rights is that of manufacturing for one's use either food or drink; and that while, according to the doctrines of the commune, the state may control the tastes, habits, dress, food, and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself.

"It will be observed that the proposition, and the argument made in support of it, equally concede that the right to manufacture drink for one's personal use is subject to the condition that such manufacture does not endanger or affect the rights of others. If such manufacture does prejudicially affect the rights and interests of the community, it follows, from the very premises stated, that society has the power to protect itself, by legislation, against the injurious consequences of that business. As was said in *Munn v. Illinois*, 94 U. S. 113, 124, while power does not exist in the whole people to control rights that are purely and exclusively private, government may require 'each citizen to so conduct himself, and so use his

ship. For example, in a case in the federal circuit court for the district of Kansas, it appeared that the defendants had erected a brewery in that state, which, with its machinery and fixtures, was designed and adapted for the making of beer, and for nothing else. For such

own property, as not unnecessarily to injure another.'

"But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system, that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, (*Sinking Fund Cases*, 99 U. S. 700, 718,) the courts must obey the constitution, rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in *Marbury v. Madison*, 1 Cranch, 137, 176, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any

time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed they are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights, secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.

"Keeping in view these principles, as governing the relations of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the state, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety

purpose it was worth \$50,000; for any other purpose, not more than \$5,000. At the time the building was erected, the making of beer was lawful. But afterwards, a constitutional amendment was adopted prohibiting its manufacture except for medical and meehan-

may be endangered by the use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. If, therefore, a state deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the constitution to another department. And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition as embodied in the constitution and laws of Kansas might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in

citizenship. Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use as a beverage, are, or may become, hurtful to society, and constitute therefore a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.

"This conclusion is unavoidable, unless the fourteenth amendment of the constitution takes away from the states of the Union those powers of police that were reserved at the time the original constitution was adopted. But this court has declared, upon full consideration, in *Barbier v. Connolly*, 113 U. S. 27, 31, 5 Sup. Ct. Rep. 357, that the fourteenth amendment had no such effect. After observing, among other things, that that amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: 'But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good or-

ical purposes. Even for these purposes a permit was required, which the defendants were unable to obtain. And they were thereupon absolutely enjoined, by the state court, from the manufacture of beer. On this state of facts, Judge Brewer, delivering a very able and

der of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.'

"Undoubtedly the state, when providing by legislation for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the constitution of the United States, and may not violate rights secured or guarantied by that instrument, or interfere with the execution of the powers confided to the general government. *Henderson v. Mayor of New York*, 92 U. S. 259; *Railroad Co. v. Husen*, 95 U. S. 465; *New Orleans Gas Co. v. Louisiana Light, etc., Co.*, 115 U. S. 650, 6 Sup. Ct. Rep. 252; *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. Rep. 454; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064; *Morgan's Steam-Ship Co. v. Louisiana Board of Health*, 118 U. S. 455, 6 Sup. Ct. Rep. 1114.

"Upon this ground—if we do not misapprehend the position of defendants—it is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or at least will be materially diminished in value, if not employed in the manufacture of beer, for every purpose; the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law. In other words, although the state, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her

limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who at the time happen to own property the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in the value of their property resulting from such prohibitory enactments.

"This interpretation of the fourteenth amendment is inadmissible. It cannot be supposed that the states intended, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. . . . The principle that no person shall be deprived of life, liberty, or property without due process of law was embodied, in substance, in the constitutions of nearly all, if not all, of the states at the time of the adoption of the fourteenth amendment, and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." In illustration of this principle, the court then proceeded to examine the cases of *Patterson v. Kentucky*, 97 U. S. 501; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Pumpelly v. Green Bay Co.*, 13 Wall. 166. Resuming the argument, the learned judge observed: "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot in any just sense be deemed

strongly reasoned opinion, held that the law in question, in its deteriorating effect upon the value of the defendants' property, was unconstitutional and void.⁹ But this decision, in the light of the adjudications already cited, was wrong. And indeed the courts generally agree that "there is a broad distinction between the taking of property under the power of eminent domain for a public use, and the incidental injury or inconvenience which results to property or business on account of the exertion of the police power of the state, when its purpose is the promotion of the public welfare. In the former case, compensation must be made; in the latter, no such

a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the fourteenth amendment in any case, unless it is apparent that its real object is not to protect the community or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty or property without due process of law. The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public is not—and consistently with the existence and safety of organized society cannot be—burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking

property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

"It is true that when the defendants in these cases purchased or erected their breweries, the laws of the state did not forbid the manufacture of intoxicating liquors. But the state did not thereby give any assurance, or come under an obligation, that its legislation on that subject would remain unchanged. Indeed, as was said in *Stone v. Mississippi*, [101 U. S. 814,] the supervision of the public health and the public morals is a governmental power, continuing in its nature, and 'to be dealt with as the special exigencies of the moment may require,' and that 'for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.' So in *Beer Co. v. Massachusetts*, 97 U. S. 32: 'If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer.'"

⁹ *State v. Walruff*, 26 Fed. Rep. 178. And see *Wynehamer v. People*, 13 N. Y. 378.

obligation arises.”¹⁰ But yet, in view of the serious losses which individuals may suffer from the application of such laws, it may be worthy of the consideration of legislatures and states, when minded to adopt prohibition, whether absolute right and justice do not require them to provide compensation for such persons. There are moral obligations, other than those which strict law enforces. And any reformation, however righteous its aim, is ill inaugurated which begins with spoliation and injustice.

§ 84. Impairing the Obligation of Contracts.

It is settled that prohibitory liquor laws, in their effect upon existing obligations, rights, or franchises, are not within the constitutional provision against laws impairing the obligation of contracts. For all rights and all property are held subject to the exertion by the state of its police power for the promotion of the general welfare. For instance, the charter of a private corporation is a contract to which the state is a party. But no legislature can surrender or bargain away the police power; all franchises are subject to its exercise. Hence, although prohibition may injuriously affect a corporation previously chartered, as by rendering unlawful the very business which its charter authorized it to engage in, it is not, in such application, unconstitutional.¹¹ Again, the effect of the adoption of prohibition may be to revoke and annul licenses to sell liquor, granted under previous laws, and still unexpired. But, as we shall see more fully hereafter,¹² such licenses are not contracts, but mere temporary permits to do what otherwise would be unlawful, and hence their cancellation, by the operation of a later law, is no invasion of any constitutional rights of the holders. It is the same in regard to the contracts of individuals. If the laws in question operate to prevent the performance of contracts previously made,

¹⁰ Moore v. Indianapolis, 120 Ind. 483, 22 N. E. Rep. 424. And see Comm. v. Alger, 7 Cush. 53; Bancroft v. Cambridge, 122 Mass. 438; Philadelphia v.

Scott, 81 Pa. St. 80; Lewis, Em. Dom. § 6; *supra*, § 32.

¹¹ Beer Co. v. Massachusetts, 97 U. S. 25; State v. Paul, 5 R. I. 185.

¹² *Infra*, § 127.

still this exercise of the police power is not obnoxious to the prohibition contained in the federal constitution.¹³

§ 85. Retrospective Effect of Prohibition.

Prohibitory laws, in their retrospective operation, are not invalid, if they do not punish acts as crimes which were not such at the time of their commission, or violate any other positive constitutional inhibition.¹⁴ Such a statute, for example, although it prohibits manufacturers and others from selling, or keeping for sale within the state, intoxicating liquors which may have been manufactured or bought by them previous to its passage, is not, for that reason, an *ex post facto* law; since, so far as it punishes such selling and keeping, it is prospective; and if it lessens the value of liquors owned in the state previous to its passage, and held at that time, such civil consequence does not make it retroact criminally, in such sense as to bring it within the definition of an *ex post facto* law.¹⁵

§ 86. Regulation of Commerce.

We have already seen that state prohibitory laws, prior to the enactment of the act of congress commonly called the "Wilson law," in so far as they prohibited the introduction of liquors from another state or country, or their sale by the importer in the original packages of importation, were adjudged unconstitutional and void.¹⁶ But a law of this character is not invalid, as encroaching on the power of congress to regulate commerce, merely because its prohibitory terms make no distinction between manufacture for consumption within the state and manufacture for export, or between a sale within the state and a sale without the state, or between the keeping of liquors in the state for sale there and the keeping of liquors for sale and shipment into other states.¹⁷ "If the law be obeyed," says the court in Iowa,

¹³ *People v. Hawley*, 8 Mich. 330.

¹⁴ *McLane v. Bonn*, 70 Iowa, 752, 30 N. W. Rep. 478; *Peisch v. Linder*, 73 Iowa, 766, 33 N. W. Rep. 133; *Craig v. Flo-range*, 71 Iowa, 761, 32 N. W. Rep. 356.

¹⁵ *State v. Paul*, 5 R. I. 185; *State v. Keerah*, Id. 497.

¹⁶ *Supra*, §§ 71-76.

¹⁷ *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6; *Pearson v. International*

"no liquor will be manufactured for transportation. Its operation is to prevent the production of an article which might be lawfully transported out of the state. Now commerce consists in the interchange of commodities or property which is the subject of trade. It does not consist of the impossible interchange of things not in existence. There must be articles of trade before commerce can exist. How, then, can it be said that the statute, by prohibiting the manufacture of an article of trade, regulates commerce? But if this view be not correct, and the authority to regulate commerce extends to the regulation of the production of articles of commerce, then the state is deprived of all authority to tax, license, prohibit, or otherwise regulate the manufacture and the manufacturers of all articles which are intended, when produced, to be the subject of interstate commerce."¹⁸

§ 87. Conflict with United States Revenue Laws.

The United States internal revenue laws are enacted for purposes of revenue merely, and not with any view to regulating or legalizing the liquor traffic. And a liquor license granted under those laws is, in effect, only a receipt for taxes, implying nothing more than that the licensee, having paid such taxes, shall be subject to no penalties under federal law. It follows that when any state or territory adopts prohibitory legislation, it is not rendered invalid by the fact that its effect upon persons holding government licenses is to prevent them from continuing the business for which they were licensed.¹⁹

§ 88. Adoption of Constitutional Amendment.

In Rhode Island, where the question of prohibition was referred to the voters of the state in the form of an amendment to the constitution, the supreme court held that it had no jurisdiction in equity

Distillery, 72 Iowa, 348, 34 N. W. Rep. 1; State v. Fitzpatrick, 16 R. I. 54, 11 Atl. Rep. 767.

¹⁸ Pearson v. International Distillery, 72 Iowa, 348, 34 N. W. Rep. 1.

¹⁹ Territory v. O'Connor, 5 Dak. 397, 41 N. W. Rep. 746; State v. Carney, 20 Iowa, 82; State v. Baughman, Id. 497.

to entertain a suit against the governor, the secretary of state, and the attorney general, who, by the act under which the amendment was submitted to the electors, were appointed a commission to count the votes and proclaim the result, merely because they had made a nugatory count of votes, or had issued an ineffectual proclamation; nor would it interfere with their possible judicial discretion in examining into the legality of the votes cast and rejecting such as were found to be illegal.²⁰

§ 89. Property in Liquors under Prohibitory Laws.

It is possible to own and possess intoxicating liquors lawfully, notwithstanding the existence of a general prohibitory liquor law in the state. For the owner may have caused it to be brought from without the state, intending it for his own cellar, or may have bought it from authorized agents within the state for medicinal or mechanical purposes. Hence the owner of liquor, which he has purchased in another state, may maintain an action against a common carrier, who was bringing it to him, and by whose fault it was lost or destroyed. And if the carrier would defend himself on the ground that the liquor was held for an unlawful purpose, the burden is on him to show that the ownership existed under such circumstances as to constitute the liquor a nuisance.²¹

§ 90. Repeal of Prior Laws by Adoption of Prohibition.

It is generally held that the enactment of a statute or constitutional amendment prohibiting the manufacture and sale of intoxicating liquors as a beverage, operates to repeal and annul all previously existing laws which permitted such manufacture or sale under regulations or restrictions.²² And all sales of such liquors made thereafter, for other than the excepted purposes, are unlawful, though made under licenses issued prior to its adoption.²³ But such an

²⁰ Hanley v. Wetmore, 15 R. I. 386, 6 Atl. Rep. 777.

²¹ Bowen v. Hale, 4 Iowa, 430.

²² State v. Tonks, 15 R. I. 385, 5 Atl. Rep. 636. Compare State v. Dorr, 82

Me. 212, 19 Atl. Rep. 171; State v. Swan, (N. Dak.) 44 N. W. Rep. 492.

²³ Prohibitory Amendment Cases, 24 Kans. 700.

enactment does not take away the right to recover for the breach of the condition of a bond given pursuant to the requirements of a license law in force before and upon the adoption of prohibition.²⁴ And although a city ordinance prohibiting the sale of liquor without a license is abrogated, so far as regards the granting of licenses, by the adoption of a general prohibitory law, yet this, it is said, does not repeal that part of the ordinance punishing illegal selling.²⁵ And a law prohibiting the sale of intoxicating liquors on Sunday, except by druggists upon prescription, although part of a chapter enacting a license system, is not void, under a prohibitory constitutional amendment; for although the rest of the chapter may be unconstitutional, yet the particular provision is not so interwoven with it that it may not stand.²⁶ Finally, where the amendment prohibits the manufacture and sale of intoxicating liquors "to be used as a beverage," this does not impliedly license such manufacture and sale for other purposes than as a beverage, and consequently the legislature has power to go beyond the terms of the amendment, and prohibit such manufacture and sale for such other purposes.²⁷

²⁴ *Coggeshall v. Groves*, 16 R. I. 18, 11 Atl. Rep. 296.

²⁵ *Franklin v. Westfall*, 27 Kans. 614.

²⁶ *State v. Clark*, 15 R. I. 383, 5 Atl. Rep. 635.

²⁷ *State v. Kane*, 15 R. I. 395, 6 Atl. Rep. 788.

CHAPTER VI.

LOCAL OPTION.

- § 91. Nature and Terms of Local Option Laws.
- 92. Constitutionality of Local Option Laws.
- 93. Petition for Election.
- 94. Notice of Election.
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- 102. Proof of Adoption of Local Option.
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- 104. Effect of Local Option on Prior Liquor Laws.
- 105. Effect of Changing Boundary of District.
- 106. Repeal of Local Option.

§ 91. Nature and Terms of Local Option Laws.

A "local option" law is one which, contemplating a diversity of opinion in different parts of the state as to the desirability of licensing the sale of liquor, gives to the people of the various localities a privilege of determining whether licenses shall be granted among them or whether prohibition shall be the rule. It is usually framed as a law for the prohibition or severe restriction of the sale of intoxicants, under penalties, containing a provision that the various counties, townships, or other divisions of the state, may hold elections to determine by popular vote whether they desire the law to be in force in their limits, and with a further provision that in each case where such election results in favor of the adoption of the law it shall take effect in the district so voting, but that each district rejecting it shall continue to be governed, in this respect, by the existing laws. As the result of these elections is seldom the same throughout the state, it follows that, in the states where this system has been tried, different localities are subject to different regulations, according to the vary-

ing sentiments and circumstances of the people. Where the option is exercised against the issuing of licenses, the terms of the law are ordinarily much the same as those of the prohibitory laws discussed in the preceding chapter. Permits may be granted to druggists to sell for medical and mechanical purposes; search and seizure provisions are enacted; and the illegal keeping of liquor for sale is declared a nuisance. The provisions for submitting the question to the people have varied somewhat in different states. But the general plan requires the filing of a petition, signed by a certain number or proportion of the citizens of the district; due publication or notice of the same; an order for an election by a designated court or officer; an election held at a designated time and in a prescribed manner; and an official proclamation of the result. In some states, the question of license is to be voted on at stated intervals, as every year or every two years; in others, it is not to be submitted within two, three, or four years of a previous local option election.

§ 92. Constitutionality of Local Option Laws.

The constitutional validity of local option laws was examined in detail in a previous section. And it was there shown that, notwithstanding some difference of opinion, the great preponderance of authority is to the effect that such a statute, if it is a complete enactment in itself, as it leaves the hands of the legislature, requiring nothing further to give it validity, and depending upon the popular vote for nothing but a determination of the territorial limits of its operation, is a valid and constitutional exertion of the legislative power.¹ As there stated, there is no force in the contention that a local option law delegates legislative power to the people; or that it is local or special, or not uniform, in its nature; or that it impairs contracts or vested rights.

§ 93. Petition for Election.

The petition for an election, required by the local option law, is a jurisdictional prerequisite. Without such a petition, sufficient in

¹ *Supra*, § 45, and cases cited.

form and signatures, the authorities have no power to order an election, and no valid election can be held.² In regard to the persons who may legally sign it, there is considerable variety in the statutory provisions. But if the law requires the petition to be signed by a majority of the "adult residents" of the county, it is held that this includes women as well as men, and adult females may sign it, though they are not electors.³ Members of the board of supervisors of the county, though they are the persons whose duty it is to order the election upon a proper petition being presented, may themselves sign the petition, and canvass for other signers, and are not thereby disqualified from acting on it.⁴ A person who signed the petition cannot withdraw from it after it has been acted upon by the county court and while an appeal is pending in a superior court, although, in the latter court, the issues are tried anew.⁵ A law which provides that a petition for election shall be presented, signed by one-tenth of the qualified voters of the district, is sufficiently complied with where two petitions for that purpose are presented, which together are signed by one-tenth of the voters, though neither one alone has the requisite number.⁶ But of course this rule could be applied only in case the two petitions were identical in terms. Any substantial variance would prevent their being considered one document. In regard to the form and contents of the petition, while it is required to conform to all the peremptory provisions of the law, a certain measure of indulgence is shown in matters not of the essence. For instance, if the law requires the petition to contain a statement that "in the opinion of the petitioner, the public good will be promoted by a prohibition of the sale or giving away of vinous or spirituous liquors within such limits," a petition without this allegation is fatally defective, and will confer no jurisdiction to order an election.⁷ But on the other hand, the fact that the petition erroneously refers to the statute is immaterial.⁸

² *Akin v. State*, 14 Tex. App. 142.

³ *Blackwell v. State*, 36 Ark. 178.

⁴ *Lemon v. Peyton*, 64 Miss. 161, 8 South. Rep. 235.

⁵ *In re McCullough*, 51 Ark. 159, 10 S. W. Rep. 259.

⁶ *State v. Weeks*, 38 Mo. App. 566; *State v. Smith*, Id. 618.

⁷ *Tally v. Grider*, 66 Ala. 119.

⁸ *Steele v. State*, 19 Tex. App. 425.

And in a case where the petition prayed for an election "to determine whether or not spirituous and intoxicating liquors, including wine and beer, should be sold" within the district, although the section of the statute authorizing the election made no mention of wine or beer, but it appeared from a comparison with other provisions of the law that the words "intoxicating liquors" were used therein as including these articles, it was held that the superfluous words in the petition might be treated as surplusage, and did not affect its validity.⁹ Under an act providing that liquor-selling may be prohibited on the petition of persons residing within three miles of any school-house or church, it is held that two points as centres cannot be designated in the same petition, and signers secured from within three miles of either.¹⁰

§ 94. Notice of Election.

The local option laws commonly provide that notices of an election to be held shall be posted by the sheriff, or other officer, at certain places throughout the district, (or published in certain newspapers,) within a prescribed period preceeding the election. If this requisite is not complied with, no valid election can be held.¹¹ But the mere fact that two of the five notices posted in the county were posted in a single precinct, would not of itself invalidate the election.¹² Yet if a less number of notices are posted than the law expressly requires, it is a fatal defect.¹³ Where the statutory provision is that "the clerk shall post, or cause to be posted, at least five copies" of the notice at different public places, and it appears that the clerk did not post the notices, but issued them, and placed them in the hands of "good men" to be posted, there is no sufficient compliance with the law shown, because it will not be presumed that such men posted the notices.¹⁴ Where the provision is that the notice shall be given by publication in a newspaper, and such notice shall be published for

⁹ State v. Schmitz, 36 Mo. App. 550.

¹⁰ Williams v. Citizens, 40 Ark. 290.

¹¹ Haddox v. Clarke Co., 79 Va. 677;
Ex parte Kennedy, 23 Tex. App. 77, 3
S. W. Rep. 114.

¹² *Ex parte Kennedy*, 23 Tex. App. 77,
3 S. W. Rep. 114.

¹³ Smith v. State, 19 Tex. App. 444.

¹⁴ James v. State, 21 Tex. App. 189, 17
S. W. Rep. 422.

four consecutive weeks, and the last insertion shall be within ten days next before the election, it is held that there must be twenty-eight days' notice of the election, exclusive of the first day of the notice, and inclusive of the day of the election.¹⁵ If the notice is published in all the newspapers among which the governor and comptroller must make their selection of those entitled to publish the laws, it will be a sufficient publication, although those officers have not as yet made any selection.¹⁶ It is not necessary for the notice to state that the petition was signed by the requisite number of voters, when the authorities appointed to consider the matter have reported that it was so signed.¹⁷

§ 95. Order for Election.

The statutes provide that upon the presentation of a sufficient petition, an order for an election shall be made by the designated authority—usually a local court, but, in some states, the county commissioners or board of supervisors. As a rule, this authority has no discretion in the matter, beyond a determination of the legal sufficiency of the petition. But if it is made the duty of the judge to decide whether the circumstances have arisen which require an election, this is not violative of the constitutional principle that the functions of the three departments of government must be kept separate.¹⁸ The power to make such order must be exercised by the person to whom it is confided, and cannot be delegated. But the mere fact that the order recites that it was made by the court, while the statute in terms confers the authority on the judge, is not enough to avoid the election, where the order is signed by the judge.¹⁹ If the statute requires the order for election to be issued at the term of court next succeeding the filing of the petition, this is imperative, and an election held under an order issued at any other term of the court is absolutely void.²⁰

¹⁵ State v. Tucker, 32 Mo. App. 620; Leonard v. Saline County Court, Id. 633.

¹⁶ State v. Circuit Court, 50 N. J. Law, 585, 15 Atl. Rep. 272.

¹⁷ State v. Weeks, 38 Mo. App. 566; State v. Smith, Id. 618.

¹⁸ State v. Circuit Court, 50 N. J. Law, 585, 15 Atl. Rep. 272.

¹⁹ Olmstead v. Crook, 89 Ala. 228, 7 South Rep. 776.

²⁰ *Ex parte* Sublett, 23 Tex. App. 309, 4 S. W. Rep. 894. But it may be ordered at a special session of the court if that

When the statute authorizes an election to determine whether or not the "sale" of intoxicating liquors shall be prohibited in the county, the court has no authority to order an election to determine whether or not the "sale or exchange or barter" of such liquors shall be prohibited in the county.²¹

§ 96. Time of Holding Election.

The time when the local option election shall be held is usually specified in the statute. If the law requires such election to take place within a designated number of days after the reception of the petition, or after the date of the order, this provision is imperative, and an election held after the prescribed time has expired, though regular in all other respects, is entirely invalid.²² Where it is provided that such election shall not be held "within" sixty days of any municipal or state election in the same city, an election held within sixty days either before or after a municipal election in the same city will be entirely void and will not have the effect of enacting prohibition in that locality.²³ However, it is held that the election is not vitiated by the fact that it was held within sixty days previous to a special municipal election which could not have been anticipated until after the date of the local option election.²⁴ It is also held that a provision of the general election law of the state, requiring special elections to be held on Tuesday, does not apply to an election under the local option law.²⁵

§ 97. Conduct of Election.

The election under a local option law, and the supervision thereof by the designated authorities, being the exercise of political and police powers incident to legislative and executive government, and not at all judicial, the courts have no jurisdiction to interfere except such as

is the first session after the filing of the petition. *Id.*

²¹ *Ex parte Beaty*, 21 Tex. App. 426, 1 S. W. Rep. 451.

²² *State v. Ruark*, 34 Mo. App. 325;

Curry v. State, 28 Tex. App. 475, 13 S. W. Rep. 752.

²³ *In re Wooldridge*, 30 Mo. App. 612.

²⁴ *State v. Ruark*, 34 Mo. App. 325.

²⁵ *State v. Circuit Court*, 50 N. J. Law, 585, 15 Atl. Rep. 272.

may be conferred by the act itself.²⁶ The formality and regularity of such election are to be tested by the terms of the statute under which it is held, and by the general principles of the law relating to elections, where applicable. For instance, it is not rendered void by the fact that a separate ballot-box was not provided for the votes cast on the question of local option, where the only statutory requirement is that the voting shall be by ballot.²⁷ Nor is the election invalidated by the fact that the voters were not asked the precise question set out in the statute; ²⁸ although, where the election should be held to decide concerning the *sale* of liquor, an election cannot be held to determine whether its *gift* or *exchange* shall be prohibited.²⁹ If the statute requires a majority vote either to accept or reject the provisions of the local option law, a tie-vote is not enough to change the policy of the district; it would leave the matter as it stood before the election.³⁰ In a case in Alabama, where the statute provided that licenses should not be issued unless a majority of the qualified voters should express a desire therefor, it was held that, although a majority of the votes were not cast "against license," yet licenses could not be issued unless a majority of the votes were cast "for license," and a showing that, out of 252 votes cast, 121 were "for license," 1 for "no license," and 130 so informal that they could not be counted, did not warrant the issuing of licenses.³¹ Whether the majority required is a majority of the registered voters of the county or township, or a majority of those actually voting at the election, will depend upon the language of the statute.³² The form of the ballots, if set out in the statute, must be exactly as there described, or at least in close conformity therewith. Thus, if the act provides for the casting of ballots "for license" and "against license," a ballot marked "no whisky" is insufficient and cannot be counted.³³

²⁶ *Scoville v. Calhoun*, 76 Ga. 263.

²⁷ *Donovan v. Comm'rs of Fairfield Co.*, 60 Conn. 339, 22 Atl. Rep. 847.

²⁸ *Gayle v. Owen County Court*, 83 Ky. 61.

²⁹ *Steele v. State*, 19 Tex. App. 425.

³⁰ *Temnick v. Owings*, 70 Md. 246, 16 Atl. Rep. 719.

³¹ *Prestwood v. Borland*, (Ala.) 9 South. Rep. 223. And see *Siloam Springs v. Thompson*, 41 Ark. 456.

³² *Chalmers v. Funk*, 76 Va. 717.

³³ *Prestwood v. Borland*, (Ala.) 9 South. Rep. 223.

§ 98. Publication of Result.

If the local option law does not make any provision as to how the result of the election shall be proclaimed, a verbal proclamation by the clerk at the court-house door, "that the local option law had carried, and that a majority of the votes were against the sale of intoxicating liquors," will be sufficient.³⁴ As a rule, however, it is required that the result be published in all the newspapers in the district, or in certain designated papers. And such publication is a condition precedent to the taking effect of the law.³⁵ And where it is provided that such publication shall be had for four successive weeks, the law contemplates that the notice shall be published for four full consecutive weeks, or twenty-eight days, from the day of its first publication.³⁶ Publication in all the newspapers of the county being a condition precedent to the taking effect of the prohibition of the act, a notice which is not published in all of them is ineffectual. But where the proper notice is published as soon as the invalidity of the former has been determined, the prohibition will take effect thereafter as provided by the terms of the act.³⁷ Where the statute does not prescribe the manner in which the fact of publication shall be proved, it is considered that the oral testimony of the publisher is competent.³⁸ The order of court declaring the result of the election, and prohibiting the sale of liquor, need not be in the precise words and form required by the statute, but is sufficient if it substantially complies therewith.³⁹ And where such an order, through manifest inadvertence or a clerical error, shows that less than a majority of the votes cast were for prohibition, when as a matter of fact it is apparent from other parts of the same order that there was a majority for prohibition, it is not thereby invalidated.⁴⁰ It is held that a certification of the returns of a local option

³⁴ Mackin v. State, 62 Md. 244.

³⁵ Toole v. State, 88 Ala. 158, 7 South. Rep. 52; Phillips v. State, 23 Tex. App. 304, 4 S. W. Rep. 893.

³⁶ Phillips v. State, 23 Tex. App. 304, 4 S. W. Rep. 893.

³⁷ Olmstead v. Crook, 89 Ala. 228, 7 South. Rep. 776.

³⁸ State v. Baker, 36 Mo. App. 58.

³⁹ James v. State, 21 Tex. App. 189, 17 S. W. Rep. 422.

⁴⁰ *Ex parte* Burrage, 26 Tex. App. 35, 9 S. W. Rep. 72.

election is sufficient if made by a majority of the commissioners.⁴¹ And in Kentucky, it is held that when a vote under the local option law results in favor of licensing the sale of liquors, the board to compare the polls need not certify the fact to the county court; although, in the other event, it is clearly necessary, as, in that case, a law with highly penal provisions will go into effect.⁴²

§ 99. Time of Taking Effect.

The time when a local option law shall go into effect, in a district voting in favor of its adoption, must be determined by the language employed in the particular statute. In some cases the law is so worded that the prohibition upon the sale of liquor will go into operation immediately upon an election being held and resulting in a majority vote against such sale.⁴³ But more usually it is provided that the law shall not take effect until after notice of the result of the election has been published, during a designated period, in a certain prescribed manner. In that event, due publication, for the full period of time contemplated by the statute, is a condition precedent to the going into operation of the prohibitory law.⁴⁴ Where, as in Alabama, it is provided that no penal act shall go into effect until thirty days after the adjournment of the legislature, this limitation must be taken into account in enacting a local option law, with reference to the time of its taking effect.⁴⁵

§ 100. Operation and Effect of Law.

Where a statute provides for prohibition upon the sale of liquor at retail, first, in any city, town, or village within the county by popular vote of such city, town, or village; second, in the county by popular vote of the whole county; and third, in any militia district of the county by popular vote of the district; it is held that the restric-

⁴¹ Fullwood v. State, 67 Miss. 554, 7 South. Rep. 432.

⁴² Comm. v. Hoke, 14 Bush, 668.

⁴³ Comm. v. Lillard, (Ky.) 9 S. W. Rep. 710.

⁴⁴ Phillips v. State, 23 Tex. App. 304, 4 S. W. Rep. 893.

⁴⁵ Olmstead v. Crook, 89 Ala. 228, 7 South. Rep. 776.

tion, when adopted by the county as a whole, operates throughout its entire territory, including all the cities, towns, and villages, as well as all the militia districts, within its limits.⁴⁶ The effect of the adoption of a local option law is to make any sale of liquor within the district, save in accordance with the exceptions set forth in the act, an indictable offense.⁴⁷

§ 101. Effect on Prior Rights and Privileges.

It is generally held that whenever prohibition is declared, in accordance with the local option law, in any given locality, it has the effect to revoke and render null all existing and unexpired liquor licenses in that locality; and any person who sells liquor within the district, thereafter, violates the law, notwithstanding he sells under a license granted before the adoption of prohibition.⁴⁸ There is a contrary ruling in Kentucky.⁴⁹ But it is not supported by the decisions elsewhere, nor by the general principles applicable to the question. For a license to sell liquor, it is agreed, is not a contract, nor a property right, nor a vested interest of any sort; it is merely a temporary permission to engage in a business which the law regards with no favor; and it may be revoked, or cancelled by a change in the system of liquor legislation, without an unlawful invasion of any rights of the holder.⁵⁰ Hence it would appear that the adoption of a law which is expressly directed against the licensed selling of liquor must necessarily have the effect of annulling outstanding licenses. And it is held that the fact that one who keeps liquor, to be sold illegally, obtained it previous to the going into effect of the local option law, does not affect his legal liability for the violation of an ordinance, subsequently passed, prohibiting such sale.⁵¹ Sometimes, however, a local option law contains an express saving of vested

⁴⁶ *Tatum v. State*, 79 Ga. 176, 3 S. E. Rep. 907. See *Ex parte Cox*, 28 Tex. App. 537, 13 S. W. Rep. 862.

⁴⁷ *State v. Emery*, 98 N. Car. 768, 3 S. E. Rep. 810; *Garner v. State*, 8 Blackf. 568.

⁴⁸ *Robertson v. State*, 12 Tex. App.

541; *Ex parte Lynn*, 19 Tex. App. 293; *State v. Cooke*, 24 Minn. 247, 31 Am. Rep. 344.

⁴⁹ *Watts v. Comm.*, 78 Ky. 329.

⁵⁰ See *infra*, §§ 127, 128.

⁵¹ *Menken v. Atlanta*, (Ga.) 3 S. E. Rep. 414.

rights. And this, it is held, embraces previously acquired rights to sell by virtue of licenses already taken out and paid for, but comprehends no right either to obtain a new license, or to sell without license, whether on the part of natural persons or of corporations.⁵²

§ 102. Proof of Adoption of Local Option.

In the state of Texas, where the local option law requires a proper petition, signed by the requisite number of qualified voters, to be filed with the commissioners' court before an election can be ordered, and also that the result of the election shall be published and promulgated, it is held that a person cannot be convicted of violating the law, unless the state proves that the required petition was filed and that the result of the election was duly promulgated, and the order of court for holding the election and the order announcing the result are not sufficient to show the adoption of local option.⁵³ But elsewhere,—under the rule that a court will take judicial notice of things which are public in their effects and relations and ought to be known within its jurisdiction,—it is not considered necessary for the state to allege or prove that local option had gone into effect in the particular county or district.⁵⁴ The defendant may indeed show that the petition was insufficient, that the notice of election was not duly published, that there was not a majority vote against license, etc., but the burden of proving such allegations is upon him.⁵⁵ In Kentucky, the law makes the entry of the certificate of the election, attested by the clerk of the county court, *prima facie* evidence of the vote upon the adoption of the law; and it is not necessary for the prosecution to prove that a majority of the qualified voters of the county had voted in favor of adopting the law, though such is the allegation of the indictment.⁵⁶ Where the law provides that the result of the election shall be placed on the minutes of the superior court,

⁵² Menken v. Atlanta, 78 Ga. 668, 2 S. E. Rep. 559.

⁵³ Henry v. State, (Tex. App.) 16 S. W. Rep. 342; Carnes v. State, 23 Tex. App. 449, 5 S. W. Rep. 133.

⁵⁴ Rauch v. Comm., 78 Pa. St. 490; Combs v. State, 81 Ga. 780, 8 S. E. Rep. 318.

⁵⁵ Young v. Comm., 14 Bush. 161.

⁵⁶ Neighbors v. Comm., (Ky.) 9 S. W. Rep. 718.

and that the entry shall be competent to show when the act went into effect, it is not error for the court to read from the minutes, and instruct the jury as to when the act went into effect in the county wherein the offense is alleged to have been committed.⁵⁷

§ 103. Contesting Validity of Election.

In some of the states, and perhaps in most, the rule is that a defendant, in a prosecution for selling intoxicating liquor contrary to a local option law, cannot attack the validity of the election adopting the law. On this point the supreme court of North Carolina very sensibly observes that "the ascertainment and declaration of the result of the election was *prima facie* correct, and it was conclusive until, in a proper action brought for the purpose, the true result otherwise should be ascertained and declared by a judicial determination. The law contemplates and intends, generally, that the result of an election, as determined by the proper election officers, shall stand and be effective until it shall be regularly contested and reversed or adjudged to be void by a tribunal having jurisdiction for that purpose. It would lead to confusion and ridiculous absurdity to allow the validity and result of an election to be contested every time the result of it, as determined by the election officers, became material collaterally in a litigation. In the present case, the defendant might be able to prove facts showing that the election mentioned was void for one cause or another. Another defendant, charged with a like offense, might be less fortunate, and the state might show that it was regular and valid; and so on indefinitely. The law does not provide for such continual and repeated contests in every case that may arise. It intends that one contest, properly instituted for the purpose, shall establish the validity or invalidity of the election questioned. If the present defendant or others were dissatisfied with the conduct of the election, or the result of it as declared, they should have promptly brought their action, as they might have done, to contest its validity and the correctness of the ascertained result. They had the right to do so,

⁵⁷ Combs v. State, 81 Ga. 780, 8 S. E. Rep. 318.

and, as they did not, it cannot be attacked in a collateral action. This is well settled."⁵⁸ But in some of the states,—as, in Texas,—the law gives to any voter of the local option district the right to contest the validity of such election within a certain number of days; and this, it is held, does not prevent one accused of violating the order of prohibition from showing at a later time that it was void.⁵⁹

§ 104. Effect of Local Option on Prior Liquor Laws.

It is a general rule that when the provisions of a local option law have been duly adopted and put in force in any given district, it then constitutes the exclusive system for the regulation of liquor-selling in that locality, and has the effect to abrogate, during its continuance, all laws and provisions of laws which are inconsistent with its terms, as well those prescribing penalties for given acts as those regarding the granting of licenses or otherwise legalizing the sale.⁶⁰ Perhaps it is more correct to say that such prior laws are *suspended* by the local option law than that they are *repealed* by it. "We do not think," says the court in Florida, "that it amounts to a repeal of the general revenue statute, but only to a suspension of its operation, in so far as it regulates the sale of intoxicating liquors, wine, or beer, as long as the local option article is in force in the county or any particular election district. Upon the local option article ceasing to be operative, these provisions of the revenue act, which had been suspended by the enforcement of the article, will resume their sway in the county or precinct."⁶¹ And it also appears that, unless other-

⁵⁸ State v. Cooper, 101 N. Car. 684, 8 S. E. Rep. 134. See, also, State v. Emery, 98 N. Car. 768, 3 S. E. Rep. 810; Comm. v. Lillard, (Ky.) 9 S. W. Rep. 710.

⁵⁹ Curry v. State, 28 Tex. App. 475, 13 S. W. Rep. 752. See, also, Young v. Comm., 14 Bush, 161.

⁶⁰ Rauch v. Comm., 78 Pa. St. 490; Comm. v. Mueller, *81 Pa. St. 127; State v. Yewell, 63 Md. 120; Wheeler v. State, 64 Miss. 462, 1 South. Rep. 632; Young v. Comm., 14 Bush, 161; Comm. v. Jarrell, (Ky.) 5 S. W. Rep. 763; Rob-

ertson v. State, 5 Tex. App. 155; State v. Weeks, 38 Mo. App. 566; Minnehaha Co. v. Champion, 5 Dak. 433, 41 N. W. Rep. 754. Compare Vallance v. King, 3 Barb. 548; State v. Smiley, 101 N. Car. 709, 7 S. E. Rep. 904; State v. Carter, 28 S. Car. 1, 4 S. E. Rep. 790; State v. Smith, (Fla.) 7 South. Rep. 848; Territory v. Pratt, (Dak.) 43 N. W. Rep. 711; Winterton v. State, 65 Miss. 238, 3 South. Rep. 735.

⁶¹ Butler v. State, 25 Fla. 347, 6 South. Rep. 67.

wise provided, the adoption of local option will exempt from punishment those persons who had become liable thereto by the violation of the prior laws thus abrogated.⁶² A local option statute, having a general repealing clause, will abrogate, so far as the two statutes are inconsistent, a prior act empowering the corporate authorities of a particular town to grant licenses to retail liquors within the corporate limits of the town.⁶³ But of course if the election results in favor of licensing, it has no effect on any prior law; the general liquor law of the state is not abrogated by the mere holding of a local option election.⁶⁴ And if the local option law does not prescribe any penalties for illegal acts, such acts are punishable under the provisions of the former statutes.⁶⁵ So where the local option law provides that, "in addition to the penalties now prescribed by law," unlawful sales may be enjoined, this has the effect, by implication, to continue in force and incorporate the penalties referred to.⁶⁶ When such law provides that an election resulting in favor of license shall not affect localities in which the sale of liquors is already prohibited by law, a town cannot, by voting for license, legalize sales within its limits, when it is within two miles of a certain church, a locality within which the sale of liquor is already prohibited.⁶⁷ When the local option law contains a provision that it shall not interfere with the manufacture or sale of domestic wines or cider, it is held that the act does not take from the local authorities the power, under the general law, to issue a license to retail domestic wines in quantities less than a quart.⁶⁸ In Missouri, it is held that the adoption by a city of the local option law does not affect the right of a druggist therein to sell liquor on the prescription of a registered and practising physician, as authorized by a prior law.⁶⁹ In Texas, where the local option law provides that

⁶² *Boone v. State*, 12 Tex. App. 184.

⁶³ *Tatum v. State*, 79 Ga. 176, 3 S. E. Rep. 907.

⁶⁴ *Hearn v. Brogan*, 64 Miss. 334, 1 South Rep. 246. And see *Zarresseller v. People*, 17 Ill. 101.

⁶⁵ *Winterton v. State*, 65 Miss. 238, 3 South Rep. 735.

⁶⁶ *Territory v. O'Connor*, 5 Dak. 397, 41 N. W. Rep. 746.

⁶⁷ *State v. Hollingsworth*, 100 N. Car. 535, 6 S. E. Rep. 417. And see *McGruder v. State*, 83 Ga. 616, 10 S. E. Rep. 281.

⁶⁸ *Brown v. State*, 79 Ga. 473, 4 S. E. Rep. 256.

⁶⁹ *Ex parte Swann*, 96 Mo. 44, 9 S. W. Rep. 10; *State v. Williams*, 38 Mo. App.

no election shall be held within the same prescribed limits in less than two years after a previous election, but at the expiration of that time the commissioners' court, whenever they deem it expedient, may order another election, it is ruled that where prohibition has been adopted in a precinct, its subsequent adoption in the same precinct, at an election held more than two years thereafter, but under an order made by the court within the two years, will leave prohibition in force, even if the second election is void.⁷⁰

§ 105. Effect of Changing Boundary of District.

Where a local option law governs an entire district, and a portion of the district is cut off and joined to other territory under a new name, the local option law still remains operative through the part not thus severed.⁷¹ And also, where a new election district is carved out of one where prohibition is in force, the same law will continue in force in the new district.⁷² Merely changing the name of a township will not have the effect of reversing its previous decision under the local option law.⁷³ And where a district embracing a city, and including many voters outside the city boundary, had voted in favor of local prohibition, and afterwards the city, without legislative authority, again voted on the question, and a majority of the votes were against prohibition, and licenses were granted, it was held that the district could not thus be severed, except at the will of the legislature, and the vote in part of the district on the question did not protect the licensees.⁷⁴

§ 106. Repeal of Local Option.

In Texas, it is within the power of the qualified voters of a justice's precinct, town, or city to repeal the local option law within the limits

⁷⁰ *Ex parte Cox*, 28 Tex. App. 537, 13 S. W. Rep. 862.

⁷¹ *Jones v. State*, 67 Md. 256, 10 Atl. Rep. 216.

⁷² *Higgins v. State*, 64 Md. 419, 1 Atl.

Rep. 876; *Prestwood v. State*, 88 Ala. 235, 7 South Rep. 259.

⁷³ *State v. Cooper*, 101 N. Car 684, 8 S. E. Rep. 134.

⁷⁴ *Comm. v. King*, 86 Ky. 436, 6 S. W. Rep. 124.

of such precinct, town, or city, in the manner provided by law, notwithstanding such law has been adopted and is in force throughout the entire county.⁷⁵ But in the other states, it is believed, no such severance of the district would be legal. The election to repeal the law cannot be called for a territory forming a part only of that for which the first election was held.⁷⁶ It is a rule that the repeal of a penal law, when the repealing statute substitutes no other penalty, exempts from punishment all persons who have offended against the provisions of the repealed law, unless it be declared otherwise in the repealing act. For this reason, if a county adopts, and afterwards rescinds, the local option law, the abrogation of its provisions in this manner being equivalent to a legislative repeal, it will exempt offenders from punishment whether their cases were pending in courts of original jurisdiction or in appellate courts, at the time of the rescission of the law.⁷⁷

⁷⁵ *Whisenhunt v. State*, 18 Tex. App. 491; *Woodlief v. State*, 21 Tex. App. 412, 2 S. W. Rep. 812.

⁷⁶ *Caldwell v. Grider*, 88 Ala. 421, 7 South. Rep. 203; *Comm. v. King*, 86 Ky. 436, 6 S. W. Rep. 124.

⁷⁷ *Freese v. State*, 14 Tex. App. 31; *Prather v. State*, Id. 453; *Wells v. State*, 24 Tex. App. 230, 5 S. W. Rep. 830; *Dawson v. State*, 25 Tex. App. 670, 8 S. W. Rep. 820; *Halfin v. State*, 5 Tex. App. 212; *Monroe v. State*, 8 Tex. App. 343.

CHAPTER VII.

TAXATION OF THE LIQUOR TRAFFIC.

- § 107. Constitutionality.
- 108. Taxation and License Distinguished.
- 109. Uniformity in Taxation.
- 110. Conflict with Other Liquor Laws.
- 111. Lien of Tax on Real Property.
- 112. Levy and Collection of Tax.
- 113. United States Internal Revenue Tax.

§ 107. Constitutionality.

If the legislature of a state, in the exercise of its discretion as to the measures best adapted to lessen the evils of intemperance, sees fit to impose a tax upon the manufacture of intoxicating liquors and upon the traffic in them, instead of adopting one of the other more directly repressive systems, there can be no doubt of its constitutional power so to do.¹ It is entirely customary, under our systems, to impose exceptional taxation upon certain pursuits and callings, upon the theory that, from their relation to the public interests, or by reason of the necessity of limiting the number of persons who may engage in them, they should be classed as special privileges or franchises. And although such an occupation tax may be additional to a tax upon the person's stock in trade, as property, there is no valid objection to selecting him for the bearing of an exceptional burden. It is true that the primary object of taxation is to raise revenue, while the regulation of a dangerous or pernicious business is referable to the police power. But it does not follow that the legislature, in providing for revenue, are to be entirely excluded from other considerations. "The right of any sovereignty," says Judge Cooley, "to look beyond the immediate purpose to the general effect, neither is nor can be disputed. The government has general authority to raise a

¹ *Napier v. Hodges*, 31 Tex. 287; *State v. Volkman*, 20 La. Ann. 585; *Cooley, Taxation*, 580; *supra*, § 55,

revenue and to choose the methods of doing so; it has also general authority over the regulation of relative rights, privileges, and duties, and there is no rule of reason or policy in government which can require the legislature, when making laws with the one object in view, to exclude carefully from its attention the other. Nevertheless, cases of this nature are to be regarded as cases of taxation. Revenue is the primary purpose, and the regulation results from the methods of apportionment that are resorted to in obtaining the revenue. Only those cases where regulation is the primary purpose can be specially referred to the police power."² And where the legislature has power to tax an occupation, it has the further power to make it a penal offense for any person to engage in that occupation without first paying the tax imposed.³ A statute taxing the business of liquor-selling may provide for the collection of the tax by the county treasurer, as other taxes are collected, and may impose penalties for its non-payment, and for the refusal of a person engaged in the business, on demand of the assessor, to sign and verify the statement of certain returns required by the act. Such provisions cannot be said to deprive the citizen of his rights or property without due process of law.⁴ Regard must be had, however, in the imposition of such taxes, as in all other acts of state legislation, to the provisions of the federal constitution. A tax upon liquors, or upon the traffic in them, must make no discrimination against the citizens or the products of other states. If it does, it will be unconstitutional, either as an abridgment of the rights of citizenship secured by the supreme law, or as an interference with commerce between the several states.⁵

§ 108. Taxation and License Distinguished.

The necessity of drawing an accurate distinction between taxation and the licensing of a business arises in those states where, as in

² Cooley, Taxation, 587.

³ Tonella v. State, 4 Tex. App. 325; Languille v. State, Id. 312.

⁴ Adler v. Whitbeck, 44 Ohio St. 539, 9 N. E. Rep. 672.

⁵ Tiernan v. Rinker, 102 U. S. 123;

Welton v. Missouri, 91 U. S. 275; Walling v. Michigan, 116 U. S. 446, 6 Sup. Ct. Rep. 454; Lyng v. Michigan, 135 U. S. 161, 10 Sup. Ct. Rep. 725; *supra*, §§ 44, 79.

Ohio, the constitution forbids the grant of "licenses" to traffic in intoxicating liquors. Now it is well settled that although the legislature is thus prohibited from *licensing* the sale of liquor, this does not prevent it from laying a *tax* on that business, with the primary object of raising revenue, and also as a means of discouraging it, or of providing against the evils which it entails. Neither the tax so imposed, nor a provision that the same shall attach as a lien on the property in which the business is conducted, constitutes a license. Nor does the tax necessarily imply either protection to the business by the state or consent to its being carried on.⁶ But this principle applies only in cases where the business of manufacturing or selling intoxicating liquors is not made unlawful by the constitution or any law of the state. If that business is under no legal condemnation, but is open to all persons to engage in, then the imposition of a tax upon it cannot be regarded as a license, because, by universal consent, a license is defined as a permission to do some act or engage in some occupation which, without such permission, *would be unlawful*. A license law, therefore, assumes the illegality of the business, and denounces penalties upon those who pursue it without previously protecting themselves by procuring a license. Also it restricts the right to obtain a license to certain classes of persons, and considers their moral qualifications in making the selection. Taxation, on the other hand, assumes the legality of the business for any who may choose to pursue it, but imposes a burden, for the public benefit, upon those engaging in it. The case is not altered by the fact that payment of the tax is made a condition precedent to the right to engage in the business. Hence it follows that any law which requires certain acts, other than the mere payment of the tax, to be done by the party as a prerequisite to his right to enter upon the pursuit of the trade in question, and makes it a penal offense to engage in the business without such formalities, is in reality a license law, no matter whether it be called a tax or by any other name. This was the case with a law formerly enacted in Ohio, which required every per-

⁶ State v. Frame, 39 Ohio St. 399; Adler v. Whitbeck, 44 Ohio St. 539, 9 N. E. Rep. 672; Anderson v. Brewster, 44 Ohio St. 576, 9 N. E. Rep. 683; Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654; Cooley, Taxation, 594.

son engaging in the traffic in intoxicating liquors to pay a specified sum of money, annually, and to execute a bond, with the further provision that any person who should engage in such traffic without having executed the bond, or after his bond was adjudged forfeited, should be deemed guilty of a misdemeanor. It was held unconstitutional, as being in effect a license, and not a tax.⁷ In the case cited, Okey, C. J., said: "One who carries on the traffic under this statute, without complying with its provisions, commits a criminal offense, while a dealer who complies with it obtains privileges denied to others." And again: "In substance, it is, as to all dealers who fail to comply with its provisions, a stringent prohibitory liquor law, and as to all dealers who do so comply, it grants the privilege in the future to deal in such liquors, to the extent not prohibited by previously existing laws. In legal effect it is an act granting to those who comply with its provisions licenses to traffic in intoxicating liquors, to the exclusion of all other dealers, and hence it is in conflict with the constitutional provision under consideration. Though not called a license law, it authorizes the granting of that which in effect is as clearly a license as the privilege granted under the act of 1831. The quality of a thing is not altered by changing its name; and the special privilege to traffic in liquors which is conferred under this act is as plainly a license as if it had been in terms so called." And the same thing was held to be true of another act in that state, which provided that whoever should engage or continue in such traffic upon land or premises not owned by him, without the written consent of the owner thereof, should be held guilty of a misdemeanor.⁸ And the converse of our main proposition above is equally true in law. That is, the exaction of license fees, for the sale of liquor, is not taxation, in either the ordinary or the constitutional signification of that term.⁹

⁷ State v. Hipp, 38 Ohio St. 199.

⁸ Pleuler v. State, 11 Nebr. 547, 10 N.

⁹ Butzman v. Whitbeck, 42 Ohio St. 223. And see, further, King v. Cappel-
lar, Id. 218; State v. Sinks, Id. 345.

W. Rep. 481.

§ 109. Uniformity in Taxation.

It is a general principle of constitutional law that taxes shall be equal and uniform in their operation. This, however, does not prevent the classification of occupations and their unequal taxation, if the differential process does not discriminate between persons properly belonging to the same class. For instance, where the legislature is empowered to tax occupations, with a proviso that such taxes shall be "equal and uniform upon the same class of subjects," this does not necessitate equality and uniformity as between different classes of occupations, nor the imposition of the same conditions upon every class. And hence a law is not unconstitutional because, as a condition precedent to engaging in the business of a retail liquor-dealer, it requires the tax to be paid for a year in advance, but permits the tax on other occupations to be paid quarterly, and requires a license to pursue such occupation, but permits others to be pursued without a license.¹⁰ Neither is this constitutional principle violated by a law which creates a lien upon realty upon which a saloon is established, for the amount of the license imposed.¹¹ And while it is requisite that all persons pursuing the same occupation in the same way should be taxed alike, there is no objection to making a distinction between different branches or different forms of the same business, according to the degree of public importance attaching to their due regulation, or to other inherent distinguishing circumstances. Thus, the legislature may lawfully discriminate, for purposes of taxation, between distilleries and breweries on the one hand, and saloons on the other hand.¹² And one sum may be charged for a license to sell liquors generally, and a less sum for a license to sell malt liquors only.¹³ So a statute imposing a smaller license tax on proprietors of bars or drinking saloons kept on steamboats owned and registered in the state than on owners of bars kept on land, does not violate the constitutional provision under consideration.¹⁴ And a law taxing all of a class alike,

¹⁰ *Fahay v. State*, 27 Tex. App. 146, 11 S. W. Rep. 108.

¹¹ *Anderson v. Brewster*, 44 Ohio St. 576, 9 N. E. Rep. 683.

¹² *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N. E. Rep. 672.

¹³ *Timm v. Harrison*, 109 Ill. 513.

¹⁴ *State v. Rolle*, 30 La. Ann. 991, 31

as liquor dealers within five miles of a town, at one price, and liquor dealers at wayside inns at a less price, is not invalid for lack of uniformity.¹⁵

§ 110. Conflict with Other Liquor Laws.

The enactment of a statute taxing the liquor traffic does not prevent the state, in the exercise of its sovereign powers of taxation and police, from passing further laws affecting the business. The fact that a saloon-keeper has complied with all the provisions of a tax law, before an amendment to it became operative, does not give him a vested right to sell under the conditions of the former law.¹⁶ A law requiring persons engaged in the sale of spirituous liquors to pay a tax and take out a license, and authorizing the sheriff to enforce payment, does not conflict with a statute declaring it an offense to retail liquor without a license.¹⁷

§ 111. Lien of Tax on Real Property.

In some of the states, the tax assessed upon a liquor dealer is made a lien upon real property occupied by him as a lessee. In regard to such a law, it is said: "If the real property on or in which the business is conducted is held by the tenant under a lease for a term made prior to the passage of the statute, the provisions for a lien in the second section would not operate. It might well be considered an unauthorized interference with private property, and contrary to the legislative intent, to subject the freehold of a lessor for assessments against the business of a lessee, over which the lessor could exercise no control during the term granted under a pre-existing lease." But the law will create a valid lien upon the property when the land is leased after the passage of the law, or if it is held by a tenancy at will from month to month. "If a tenant engages in a business which, by causing intemperance, pauperism, and crime, becomes a

Am. Rep. 234; *Kaliski v. Grady*, 25 La. Ann. 576.

¹⁵ *Territory v. Connell*, (Ariz.) 16 Pac. Rep. 209.

¹⁶ *Reithmiller v. People*, 44 Mich. 280, 6 N. W. Rep. 667.

¹⁷ *New v. State*, 34 Tex. 100.

proper subject for the exertion of the police power of the state, the legislature may with propriety include the premises of the lessor, which sustain and derive profit and advantage from the subject-matter upon which such power is exerted.”¹⁸ In Michigan, it is held that the act of 1875, postponing all liens, mortgages, conveyances, and incumbrances to the lien of the liquor tax, does not apply to liens or conveyances attaching before the passage of the act.¹⁹

§ 112. Levy and Collection of Tax.

An order of the proper officers, that there shall be levied on all occupations in the county, not specially provided for by the laws of the state, “a tax of one-half of the state occupation tax, as levied by the laws of the state,” is a sufficient levy of a tax upon the occupation of liquor dealers, a state statute taxing such occupation at a specified sum.²⁰ Under the United States internal revenue laws, two liquor assessments, covering partially the same period, will be presumed to be for different liquors.²¹ In Ohio, under the “Dow law,” where the assessment year begins on the fourth Monday of May, it is held that one beginning business on the first day of May is required to pay an amount proportioned to the remainder of the assessment year, but not less than a certain minimum sum.²² Under the general rule that all taxes, unless otherwise specified, are payable in money only, it is held that the note of a liquor dealer, payable on time, cannot be received in satisfaction of the tax imposed upon him, and, if taken in payment thereof, is void as in violation of public policy.²³ Where the law under which a liquor tax was levied was unconstitutional and void, a person who, under protest, has made the payment required by the act, may recover back the sum so paid.²⁴

¹⁸ *Anderson v. Brewster*, 44 Ohio St. 576, 9 N. E. Rep. 683.

¹⁹ *Finn v. Haynes*, 37 Mich. 63.

²⁰ *Wade v. State*, 22 Tex. App. 629, 3 S. W. Rep. 786.

²¹ *United States v. O'Neill*, 19 Fed. Rep. 567.

²² *Kusta v. Kimberly*, 23 Wkly. Law Bul. 379.

²³ *Doran v. Phillips*, 47 Mich. 228, 10 N. W. Rep. 350. See *Cooley*, Taxation, 452, 710; *Black*, Tax-Titles, § 50.

²⁴ *Catoir v. Watterson*, 38 Ohio St. 319.

§ 113. United States Internal Revenue Tax.

A license from the United States, under the internal revenue laws, conveys to the licensee no authority to carry on the licensed business within a state. The requirement of payment for such licenses is only a mode of imposing taxes on the licensed business, and the prohibition, under penalties, against carrying on the business without a license is only a mode of enforcing the payment of such taxes.²⁵ A government license, therefore, cannot be used as a shield against the enforcement of state laws. It is purely and simply a form of taxation. For the internal revenue laws are enacted solely as a means of raising revenue. They have no effect upon the internal police of the states, with which congress has nothing to do, and cannot be construed as evincing an intention to either legalize or regulate the traffic in intoxicating liquors. That a dealer has already paid a tax to the United States gives him no claim to immunity from state or municipal taxation. And if his business is put under the ban of state law, his government license is no justification for his continuing it.²⁶ All persons or corporations engaging in the traffic are subject to pay the United States tax. For example, a city, if it distills and sells spirits, whether authorized by its charter or not, must pay the tax.²⁷ And the stockholders of a corporation engaged in operating a distillery are "persons interested in the use of the distillery," within the meaning of the statute which declares that all such persons shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therein.²⁸

²⁵ License Tax Cases, 5 Wall, 462.

²⁸ United States v. Wolters, 46 Fed.

²⁶ *Supra*, § 87; *infra*, § 125.

Rep. 509.

²⁷ Salt Lake City v. Hollister, 3 Utah, 200, 2 Pac. Rep. 200.

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PART I. CONSTITUTIONALITY OF LICENSE LAWS.**§ 114. The Licensing System.**

Of the various systems of legislation for the suppression of the evils of intemperance or of regulating the traffic in alcoholic beverages, that which is based upon the granting of licenses to sell intoxicants is the one prevailing in the greatest number of states. The provisions of the various statutes differ widely in points of detail. But the fundamental idea of all is the restriction of the right to sell liquor to a limited number of responsible and trustworthy persons, with such conditions as to the conduct of their business, and the classes of persons to whom they may sell, as will tend to reduce the inevitable evils of the traffic to a minimum. Laws of this character usually specify the personal qualifications of those to whom the privilege may be accorded. They are required, for example, to be temperate and of good moral character, adults, citizens, and residents of the state or district. The method of applying for and obtaining licenses is also prescribed in detail, provision being commonly made

for a written petition, endorsed by a certain number of persons, which is referred to a court or board, empowered to hear counter-petitions or remonstrances, and invested with a sound discretion as to granting or refusing the application. The exaction of a fee from the persons licensed is also a part of this system. But in some of the states it is hardly greater in amount than is necessary to cover the expenses of hearing the application and granting the license; while in others it is set at a high figure, partly for the purpose of lessening the number of saloons, and partly with a view to making the dealers bear an extra portion of the expense entailed upon the public by the pauperism and crime which the trade engenders. As a rule, also, the licensee is required to furnish a bond, with sureties, conditioned for his due observance of the law. And he is further made subject to regulations as to the place and conduct of his business, as to the hours and days when he may not ply his trade, and as to the persons to whom he may not sell, and to other restrictions too numerous and diverse to be mentioned in this brief summary. The effect of this system is to make the traffic in intoxicating liquors, save by those who have been duly licensed, an unlawful avocation, and, usually, a penal offense. In other words, the right to sell liquor, which, in the absence of any statutory provision, might have been exercised by any one, is by the statute converted into a franchise, and can be exercised only by those who have actually obtained a license.¹ And we usually find, in the statutes, careful provision made for the penal consequence which shall follow the infraction of any prohibition of the law, either by those who engage in the business without license, or by licensed dealers who disregard the restrictions imposed upon the exercise of their privilege.

§ 115. License Laws Constitutional.

In a former chapter we had occasion to examine in detail the validity of laws enacted as a part of the licensing system. And it was there seen that statutes of this character, with provisions such as those outlined above, are almost universally held to be free from

¹ Mayor of New York v. Mason, 4 E. D. Smith, 142.

constitutional objection. In particular, it appeared that, although the law may require the applicant to procure the assent or recommendation of a certain number or proportion of the residents of his district, it cannot therefore be said unlawfully to subject him to the will of his neighbors, or to abridge his rights as a citizen; that the privilege might be restricted to citizens or residents of the state, without any violation of the provisions of the federal constitution; that it was competent to confine the granting of licenses to certain classes of citizens, or to require certain proper qualifications, discriminating against the vicious or disreputable; that laws regulating the conduct of the licensee's business, calculated to guard against the abuse of the privilege or the grosser evils attending its exercise, were not impeachable on constitutional grounds; and that the revocation of a license, either for violations of the law under which it was held, or upon a change of legislative policy, infringed no constitutional rights of the holder.² In respect to most of these questions, the validity of such laws has ceased practically to be contested. As concerns others, any doubt that may arise will admit of easy solution in accordance with well settled general principles.

§ 116. Repeal of Prior Laws by Enactment of License Law.

Any radical change of state policy, in the system of liquor legislation, will usually be attended by an entire repeal of the laws on that subject previously in force. Thus, when a state adopts total prohibition as its rule, the license laws, with all their subsidiary and related enactments, are thereby abrogated. And conversely, when a statute which provides for licensing the sale of liquors, and prohibits the sale except under license, is intended to be exhaustive of the subject of liquor-selling, it will, by necessary intendment, repeal a previously existing law which prohibited such sale absolutely.³ But whether the penalties denounced by the former law will be abrogated or not, will depend upon whether they are consistent with those pre-

² *Supra*, §§ 46-51. And see *State v. Gray*, (Conn.) 22 Atl. Rep. 675. see *State v. City of Spokane Falls*, (Wash.) 25 Pac. Rep. 903.

³ *Cullen v. State*, 42 Conn. 55. And

scribed by the new act, or are duplicated therein, or may be regarded as cumulative.⁴ And what effect the later statute will have upon penalties incurred, or prosecutions begun, under the former law, will depend upon the terms of the new act. As a general rule, the repeal of a penal law, when the repealing statute substitutes no other penalty, exempts from punishment all persons who have offended against the provisions of the repealed law, unless it be declared otherwise in the repealing act.⁵

PART II. NATURE AND EFFECT OF LICENSES.

§ 117. Definition of License.

"A license is essentially the granting of a special privilege to one or more persons, not enjoyed by citizens generally, or at least, not enjoyed by a class of citizens to which the licensee belongs. A common right is not the creature of a license law."⁶ "In a general sense, a license is permission granted by some competent authority to do an act which, without such permission, would be illegal."⁷ "The popular understanding of the word 'license' is undoubtedly a permission to do something which, without the license, would not be allowable. This is also the legal meaning. The object of a license is to confer a right which does not exist without a license."⁸ "A license is a privilege granted by the state, usually on payment of a valuable consideration, though this is not essential. To constitute a privilege, the grant must confer authority to do something which, without the grant, would be illegal; for if what is to be done under the license is open to every one without it, the grant would be merely idle and nugatory, conferring no privilege whatever. But the thing to be done may be something lawful in itself, and only prohibited for the purposes of the license; that is to say, prohibited in order to compel the taking out of a license."⁹ From these definitions, which

⁴ State v. Sutton, 100 N. Car. 474, 6 S. E. Rep. 687.

⁵ *Supra*, § 106.

⁶ State v. Frame, 39 Ohio St. 399, 413.

⁷ State v. Hipp, 38 Ohio St. 199, 226.

⁸ Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654.

⁹ Cooley, Taxation, 596.

are among the best to be found in the books, it will be apparent that three leading ideas are involved in the definition of a license under the liquor laws. First, it confers a special privilege or franchise, upon selected persons, to pursue a calling not open to all. Second, it legalizes acts which, if done without its protection, would be offenses against the statute. Third, it is a privilege granted as part of a system of police regulation, and herein is distinguishable from taxation. A tax upon a business is imposed primarily as a means of raising revenue, and does not lose its character because, as a secondary object, it contemplates the regulation of the business. A license-fee is exacted primarily as a means of restricting or regulating a trade, and it continues to be such although, incidentally, it may produce an addition to the public revenue.¹⁰

§ 118. No License Created by Parol or Implication.

Licenses to sell liquor are required to be in writing and in a certain form, and verbal permission, even from the officer authorized to issue licenses, and upon performance of the prerequisite conditions, is not equivalent to a formal license.¹¹ Nor will any license pass, or the necessity of obtaining it be dispensed with, by mere implication from the statute. For example, where a law declares that no license shall be granted outside of cities and towns, and that it shall be unlawful to sell without license, this does not imply that liquors may be sold in cities and towns without a license.¹² So a statutory provision that "any person who, after the 15th day of January in any year, engages in or carries on any business for which a license is required," shall be fined, does not authorize one to engage in such business prior to January 15th without a license.¹³ So again, a conviction and fine for retailing liquor without a license, does not operate as a license to sell for a year.¹⁴ And an order of the selectmen of a town to an officer, directing him to cause all saloons to be closed at a certain hour, and containing an intimation of an intent to prose-

¹⁰ See, *supra*, § 108.

¹¹ *State v. Moore*, 14 N. H. 451; *Lawrence v. Gracy*, 11 Johns. 179.

¹² *State v. Cofield*, 22 S. Car. 301.

¹³ *Moog v. Espalla*, (Ala.) 9 South. Rep. 596.

¹⁴ *State v. McBride*, 4 McCord, 332.

cute offenders against the law in certain contingencies, is not a license to sell intoxicating liquors at times and under circumstances not mentioned.¹⁵

§ 119. Wrongful Refusal or Neglect to Grant License.

The fact that the authorities charged with the duty of issuing liquor licenses wrongfully or arbitrarily refused to grant a license to the applicant, is not equivalent to a proper license, and affords him no justification or defense for engaging in the traffic without a license; he has his remedy by *mandamus*, and this remedy he must successfully pursue before he can legally begin selling.¹⁶ And the refusal of the licensing authorities to grant any licenses whatever for the sale of liquor, within the territory of their jurisdiction, does not operate as a general license to all persons residing in the district to pursue the traffic.¹⁷ Hence, in a criminal prosecution for selling without license, evidence going to show that the defendant presented a proper petition for a license, that he tendered the required bond and possessed all the qualifications of a dram-shop keeper, but that the authorities failed to grant him a license, is not admissible.¹⁸ So, in a district where local option has been declared, but is void for a defect in the proceedings, one who tendered the amount of the tax due for selling liquors and demanded a license, which was refused, is punishable for selling without a license.¹⁹ And that the district has voted in favor of license, upon an election under the local option law, is not enough to protect the seller; he must have actually obtained a license.²⁰ One who sells after the expiration of his license cannot defend on the ground that he was induced by town officers to believe that his license would be renewed, and that it was customary to date licenses back.²¹ There is one decision, however, in the state of Illinois, which appears inconsistent with the general current of the

¹⁵ Comm. v. Matthews, 129 Mass. 485.

¹⁶ Brock v. State, 65 Ga. 437; Kadgihn v. Bloomington, 58 Ill. 229; Kansas City v. Flanders, 71 Mo. 281; State v. Jamison, 23 Mo. 330.

¹⁷ Mayor of New York v. Mason, 4 E. D. Smith, 142; Comm. v. Blackington,

24 Pick. 352; State v. Downer, 21 Wis. 274.

¹⁸ State v. Huntley, 29 Mo. App. 278.

¹⁹ Curry v. State, 28 Tex. App. 477, 13 S. W. Rep. 773.

²⁰ State v. Cron, 23 Minn. 140.

²¹ State v. Brady, 14 R. I. 508.

authorities. It was there held that a person who strictly complies with the ordinances of a village having power to regulate and license the sale of liquor, by paying the fee required for the privilege, and giving a bond which is accepted, will be protected in selling, although the clerk may have neglected to give him a license; the ordinance, in such cases, is the authority to sell, and the license is only evidence of it; no formal license is necessary.²²

§ 120. Impossibility of Obtaining License.

It is no defense to an indictment for selling liquor without a license that the sale was made where licenses are not granted under any circumstances.²³ So the fact that, in a given city, there is no person or court empowered to grant licenses, as contemplated by law, is no justification to one who engages in the liquor traffic without a license, in violation of the statutes.²⁴ And a plea that the municipality cannot take money for a license to sell in that part of the town where the sale in question was made, is not good.²⁵ And the fact that no provision is made by the law of a state for granting licenses for the sale of liquor in boats upon a river which forms one of its boundaries, does not give the right to sell in such boats without a license.²⁶ In a prosecution for violating a city ordinance by retailing liquor without a license, it is no defense that the license could not be renewed for a month after its expiration, because of the illness of the city clerk, and that a license was subsequently taken out, covering the time during which the defendant had no license, and money paid therefor into the city treasury.²⁷ But in a case where a new license law took effect in April, but the system of licenses therein provided did not take effect until July, it was held that one whose former license expired after the former date and before the latter, was not liable to any penalty for selling without a license until the

²² *Prather v. People*, 85 Ill. 36.

²³ *State v. Tucker*, 45 Ark. 55; *State v. Brown*, 41 La. Ann. 771, 6 South. Rep. 698.

²⁴ *State v. McNeary*, 88 Mo. 143.

²⁵ *Indianapolis v. Fairchild*, 1 Ind. 122.

²⁶ *Welsh v. State*, 126 Ind. 71, 25 N. E. Rep. 883.

²⁷ *Reese v. Atlanta*, 63 Ga. 344.

latter date.²⁸ And a similar ruling was made in the case of a dealer, who, having had a legal and competent license, continued to make sales after such license expired, but before the time of the next meeting of the commissioners of excise for the purpose of granting licenses.²⁹ But where it appears, by the appropriate record, that the town authorities have licensed the highest number of persons which the law permits, and the record does not show that any additional number have been licensed, it is not competent for a defendant, in a prosecution for illegal selling, to show, by an unrecorded license, that he had authority to make the sales charged against him as offenses.³⁰

§ 121. Performance of Conditions not Equivalent to Obtaining License.

It is generally held that the performance, by an applicant for a license, of the conditions which the statute imposes as prerequisite to the grant of the privilege, is not equivalent to an actual issuing of a license to him. His right is not complete until the license itself is in his hands. Before that, he is not justified in beginning to make sales. Thus, although he executed the bond, and tendered the fee, required for a license, this does not give him a right to sell unless and until he obtains a license.³¹ In Indiana it is held that where an order for the issuing of a license has been made, a failure of the applicant to procure such license, or of the officer to issue it, would

²⁸ *Village of Rome v. Knox*, 14 How. Pr. 268.

²⁹ *Palmer v. Doney*, 2 Johns. Cas. 346.

³⁰ *State v. Shaw*, 32 Me. 570.

³¹ *State v. Bach*, 36 Minn. 234, 30 N. W. Rep. 764; *State v. White*, 23 Ark. 275; *Roberts v. State*, (Fla.) 7 South. Rep. 861. In the case last cited it was said: "It is argued that the defendant tendered the money and demanded a permit to sell liquors, etc., and that the officer whose duty it was to grant the permit refused to grant it, and for this reason the defendant, in selling without a license, was not legally liable for such

selling. But this is not correct, because it makes no difference whether the defendant offered to pay the money or not, as his authority for selling could only be shown by the proper license. If the defendant was entitled to the permit and license, he could have compelled the proper officer to grant them. This he did not do, but proceeded to sell without authority, and hence laid himself liable to the penalties of the law." And see *Comm. v. Welch*, 144 Mass. 356, 11 N. E. Rep. 423; *Vannoy v. State*, 64 Ind. 447.

not subject the party to prosecution for subsequent sales; but if he has not paid his money into the treasury, nor filed the required bond, he is liable to prosecution.³² And it appears that the order for a license and the execution of the bond are not enough to protect him, if the fee has not been paid.³³ But pending an appeal from the order of court granting a license, the applicant may sell, if he tenders a proper bond and the license fee, although the county auditor unlawfully refuses to issue the license.³⁴

§ 122. Retroactive Effect of License.

It is well settled, upon the authorities, that a license to sell liquor has no relation back to the date of the order of court granting permission to obtain it, or to the date when the statutory conditions were complied with; it cannot act retrospectively, so as to condone offenses against the statute prior to its issue; it will only protect the licensee in respect to sales made after it was actually issued to him.³⁵ And this rule has been applied in a case where the sale was made after a petition for license had been filed, but the license could not be obtained until afterwards, because the licensing commissioners had not been appointed.³⁶ The principle is the same under the United States internal revenue laws. A receipt for a license tax is not retroactive, and cannot be admitted in evidence on a charge for retailing liquor during a period of time prior to its date.³⁷ Nor can a license be antedated, so as to cover offenses already committed.³⁸ And if a person charged with an offense under the statute relies upon a license dated before the day of the alleged offense, the prosecution may show that the bond required was not filed, the license fee not paid, and the license not issued, until after that day, and this being proved, the

³² *Houser v. State*, 18 Ind. 106.

³³ *Dudley v. State*, 91 Ind. 312.

³⁴ *Padgett v. State*, 93 Ind. 396.

³⁵ *State v. Hughes*, 24 Mo. 147; *Edwards v. State*, 22 Ark. 253; *Kingston v. Osterhoudt*, 23 Hun, 66; *Comm. v. Welch*, 144 Mass. 356, 11 N. E. Rep. 423; *Bolduc v. Randall*, 107 Mass. 121; *Keiser*

v. State, 78 Ind. 430. This last case overrules *Vannoy v. State*, 64 Ind. 447, and *State v. Wilcox*, 66 Ind. 557.

³⁶ *Bolduc v. Randall*, 107 Mass. 121.

³⁷ *United States v. Angell*, 11 Fed. Rep. 84.

³⁸ *Wiles v. State*, 33 Ind. 206.

license affords no justification.³⁹ It has been remarked by Dr. Bishop that "where the licensing body is the representative of a municipal corporation, to which is to be paid the penalty for illegal selling,—as, where it is the city council, and the penalty consists of money payable to the city,—an antedated license is deemed to be a release also of penalties already incurred."⁴⁰ And this statement is supported by authority,⁴¹ as well as by a reasonable view of the principles applicable to the case. But it appears that if a suit has already been commenced for the penalty, a subsequently issued license will not operate as a release of the penalty, although it takes effect from a prior day and covers the offense.⁴²

§ 123. Number of Licenses Required.

Inasmuch as state laws and municipal ordinances frequently provide for the classification of various occupations, for purposes of license or taxation, and require different kinds of licenses for the various branches of the liquor traffic, it is easily seen that a person may need a number of licenses to protect all the sales he may make. Thus, if distinct licenses are provided for manufacturers, for wholesalers, and for retailers, a person holding one kind only cannot lawfully engage in branches of the business which his license does not contemplate.⁴³ And so, if one pursues a business which is required by law to be licensed, but which is not mainly concerned with the selling of liquor, or to which the sale of liquor is merely incidental, his license to pursue the business in question will not authorize him to retail intoxicants, if such retailing, by itself, is made a subject for a separate license. For example, in Louisiana, liquor cannot be sold under a confectioner's license, notwithstanding it is locally the custom for confectioners to make such sales in their business.⁴⁴ Nor, in the same state, can a licensed retail grocer, unless he also holds a coffee-

³⁹ *Comm. v. Welch*, 144 Mass. 356, 11 N. E. Rep. 423.

⁴⁰ *Bishop*, Stat. Crimes, § 1001.

⁴¹ *Charleston v. Corleis*, 2 Bail. (S. Car.) 186.

⁴² *Charleston v. Schmidt*, 11 Rich. 343.

⁴³ See *State v. Newcomb*, 107 N. C. 900, 12 S. E. Rep. 53; *Schumm v. Gardener*, 25 Ill. App. 633; *State v. Cahen*, 35 Md. 236.

⁴⁴ *New Orleans v. Jane*, 34 La. Ann. 667.

house license, sell intoxicating liquor by the glass, although he may sell it in quantities less than a gallon, but not to be consumed on the premises.⁴⁵

§ 124. Separate Licenses Required from Different Jurisdictions.

The fact that a dealer in intoxicating liquors holds a license from one jurisdiction, such as the state or the county, does not exempt him from the duty of taking out the license required by another jurisdiction in the same territory, such as a city or incorporated town; for the requirement of a license, being in the nature of a restraint upon the traffic, is equally (and concurrently) within the power of the two jurisdictions.⁴⁶ And an act giving to municipal corporations the right to license the sale of liquor, is not unconstitutional as violating the rights of sellers already licensed by the county officers, because a liquor license is at all times subject to control by the legislature.⁴⁷ So also, a municipal ordinance requiring those who apply for a town license to first obtain a license from the county commissioners, as provided by law, is a reasonable regulation.⁴⁸ And the fact that a city has, by a charter or statute, exclusive power to license liquor dealers in its limits, raises no implication, in favor of such dealers, of exemption from a general law of the state taxing the traffic.⁴⁹

Although the great mass of authority supports the rule above stated, and that in the most plain and emphatic terms, yet, in some quarters, the courts appear to entertain a more or less definite notion

⁴⁵ *State v. Sies*, 30 La. Ann. 918.

⁴⁶ *Furman v. Knapp*, 19 Johns. 248; *Comm. v. Sweitzer*, 129 Pa. St. 644, 18 Atl. Rep. 569; *Parsley v. Hutchins*, 2 Jones, (N. Car.) 159; *State v. Propst*, 87 N. Car. 560; *State v. Mancke*, 18 S. Car. 81; *Cuthbert v. Conly*, 32 Ga. 211; *State v. Estabrook*, 6 Ala. 653; *Lutz v. Crawfordsville*, 109 Ind. 466, 10 N. E. Rep. 411; *Hedderich v. State*, 101 Ind. 564, 1 N. E. Rep. 47, 51 Am. Rep. 768; *McKinney v. Salem*, 77 Ind. 213; *Inde-*

pendence v. Noland, 21 Mo. 394; *State v. Sherman*, 50 Mo. 265; *State v. Harper*, 58 Mo. 530; *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471; *Ex parte Lawrence*, 69 Cal. 603, 11 Pac. Rep. 217; *Elk Point v. Vaughn*, 1 Dak. 113, 46 N. W. Rep. 577.

⁴⁷ *McKinney v. Salem*, 77 Ind. 213.

⁴⁸ *Wagner v. Garrett*, 118 Ind. 114, 20 N. E. Rep. 706.

⁴⁹ *Decker v. McGowan*, 59 Ga. 805.

that a person who has paid for and taken out a state or county license cannot properly be made subject to an ordinance, requiring an additional license, passed after the date of the license he holds, or passed in pursuance of authority thereafter conferred.⁶⁰ But a just conception of the nature of the privilege granted by a license, and of the character and scope of the police power, will plainly disclose the fallacy of this view. It might be right in principle if a license were a contract; but a license is not a contract. It might be sustainable if a license conferred a vested right to continue the trade without further hindrance or imposition; but such is not the case. On the contrary, a license is a mere temporary permit to do what otherwise would be unlawful. It is revocable at the will of the power which granted it. It is taken subject to the contingency that it may be modified, restricted, or annulled, by subsequent legislative action. And if the holder of it is subjected to further taxation or regulation, by a power having concurrent jurisdiction over the subject-matter, he cannot complain of an injury to any rights secured to him by the law or the constitution.⁶¹

§ 125. United States License no Protection against State Laws.

A license granted by the United States, under the internal revenue laws, to carry on the business of a liquor dealer in a particular state named, although it has been granted in consideration of a fee paid, does not give the licensee power to carry on the business in violation of the state laws forbidding such business to be conducted within its limits; nor does it relieve the holder from the necessity of taking out any license or licenses required by the laws of the state, if that is the system therein prevailing.⁶² Thus, the holder of a government

⁶⁰ See *Chastain v. Calhoun*, 29 Ga. 333; *Mayor of Rome v. Lumpkin*, 5 Ga. 447; *Ex parte Schmitker*, 6 Nebr. 108.

⁶¹ *Elk Point v. Vaughn*, 1 Dak. 113, 46 N. W. Rep. 577; *McKinney v. Salem*, 77 Ind. 213. And see *infra*, §§ 127, 128, 189.

⁶² *McGuire v. Comm.*, 3 Wall. 387;

Pervear v. Comm., 5 Wall. 475; *License Tax Cases*, 5 Wall. 462; *State v. Delano*, 54 Me. 501; *Comm. v. Thorniley*, 6 Allen, 445; *Comm. v. O'Donnell*, 8 Allen, 548; *Comm. v. Holbrook*, 10 Allen, 200; *Comm. v. Keenan*, 11 Allen, 262; *Comm. v. McNamee*, 113 Mass. 12; *Comm. v. Sanborn*, 116 Mass. 61; *Comm.*

license, whose traffic is conducted on board a steamer plying within the limits of a state, is subject to the state license law.⁵³ Any possible uncertainty in this regard will be avoided by considering the real nature of the federal licenses. The requirement of a fee is only a mode of imposing a tax on the business, and the prohibition, under penalties, against carrying on the business without a license is only a mode of enforcing the payment of such tax.⁵⁴ Hence, as we have already pointed out, a government license is purely and simply a form of taxation. The laws under which it is granted are enacted solely as a means of raising revenue. They have no effect upon the internal police of the states, with which congress has no power to interfere, and they cannot be understood as either legalizing or regulating the traffic in intoxicating liquors. In view of the repeated and uniform rulings to this effect, one cannot but be surprised by the persistence and the confidence with which government licenses are thrust forward in defense to prosecutions for violating the liquor laws of a state. But if the volume of adjudged cases were not sufficient to settle the question, it should be regarded as determined beyond all peradventure by the act of congress on the subject. It is therein provided that "the payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any state for carrying on the same within such state, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such state or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any state from placing a duty or tax on the same trade or business, for state or other purposes."⁵⁵ It has been pointed out that this section, standing in the Revised Statutes as just quoted, omits the words "or territory," after the word "state," which were found in the original act. But another section in the same chapter

v. Sheckles, 78 Va. 36; State v. Joyner, 81 N. Car. 534; State v. Hazell, 100 N. Car. 471, 6 S. E. Rep. 404; Pierson v. State, 39 Ark. 219; Boyd v. State, 12 Lea, 687; Block v. Jacksonville, 36 Ill. 301; State v. McCleary, 17 Iowa, 44;

State v. Baughman, 20 Iowa, 497; State v. Funk, 27 Minn. 318, 7 N. W. Rep. 359.

⁵³ Comm. v. Sheckles, 78 Va. 36.

⁵⁴ License Tax Cases, 5 Wall. 462.

⁵⁵ Rev. St. U. S. § 3243.

expressly provides that the word "state" shall be understood as including the territories. Hence, it is ruled, it does not appear that congress intended, by omitting to mention the territories, to protect liquor licensees in those districts.⁵⁶

§ 126. Effect of Government License.

In addition to the rulings that a government license is no protection against the state laws, cited in the last section, there are certain other decisions, which must be here noticed, upon the nature and effect of such licenses. Thus, it is held that a person indicted, under a law of the state, for illegally keeping or selling intoxicating liquors, is not entitled to remove the cause for trial into the circuit court of the United States, under the act of congress of 1833,⁵⁷ although he holds a license from the federal government to sell liquor, and has paid revenue taxes thereon; because such a case is not, in the language of the act, "a suit or prosecution against any officer of the United States or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title set up or claimed by such officer or other person under any such law of the United States."⁵⁸ Furthermore, the payment of the special internal revenue tax for selling liquors in a collection district does not authorize the licensee to introduce liquors into the Indian country, in violation of federal law, although such Indian country is within the collection district.⁵⁹

§ 127. Licenses are not Contracts.

The grant of a license to sell intoxicating liquors, made by a state or municipal corporation under the terms of a law or ordinance, is no more than a permit to the licensee to engage in such traffic and

⁵⁶ Territory v. O'Connor, 5 Dak. 397,
41 N. W. Rep. 746.

⁵⁷ Rev. St. U. S. § 643.

⁵⁸ Comm. v. Casey, 12 Allen, 214;
State v. Elder, 54 Me. 381.

⁵⁹ United States v. Forty-Three Gallons of Whisky, 108 U. S. 491, 2 Sup. Ct. Rep. 906.

continue in the same so long as it is not forbidden by the authorities. Neither the state nor any of its agencies can surrender, or ever does surrender, the power to regulate and control the traffic in liquors, because that is a branch of its police power and is inalienable. Hence it follows that such a license cannot be considered a contract between the state or municipality and the individual. And any laws enacted by lawful authority, modifying its terms, imposing additional burdens or restrictions upon the holder, or even revoking the privilege, are not open to the constitutional objection of impairing the obligation of a contract. These principles are fully settled upon the authorities.⁶⁰ In the leading case upon the subject it is said: "These licenses to sell liquor are not contracts between the state and the persons licensed, giving the latter vested rights protected on general principles and by the United States constitution against subsequent legislation, nor are they property in any legal or constitutional sense. They have neither the qualities of a contract or of property, but are merely temporary permits to do what otherwise would be an offense against a general law. They form a portion of the internal police system of the state, are issued in the exercise of its police powers, and are subject to the direction of the state government, which may modify, revoke, or continue them, as it may deem fit. If the act of 1857 had declared that licenses under it should be irrevocable, (which it did not, but by its very terms they are revocable,) the legislature of subsequent years would not have been bound by the declaration. The necessary powers of the legislature over all subjects of internal police, being a part of the general grant of legislative power given by the con-

⁶⁰ *Beer Co. v. Massachusetts*, 97 U. S. 25; *La Croix v. Fairfield Co.*, 49 Conn. 591; *Comm. v. Brennan*, 103 Mass. 70; *Calder v. Kurby*, 5 Gray, 597; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 659; *Brown v. State*, 82 Ga. 224, 7 S. E. Rep. 915; *Powell v. State*, 69 Ala. 10; *Fell v. State*, 42 Md. 71, 20 Am. Rep. 83; *Wheeler v. State*, 64 Miss. 462, 1 South. Rep. 632; *Hearn v. Brogan*, 64 Miss. 334, 1 South. Rep. 246; *Rowland v. State*, 12 Tex. App. 418; *Prohibitory*

Amendment Cases, 24 Kans. 700, 724; *McKinney v. Salem*, 77 Ind. 213; *Moore v. Indianapolis*, 120 Ind. 483, 22 N. E. Rep. 424; *Columbus City v. Cutcomp*, 61 Iowa, 672, 17 N. W. Rep. 47; *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471; *Huffsmith v. People*, 8 Colo. 175, 6 Pac. Rep. 157, 54 Am. Rep. 550; *State v. Horton*, (Oreg.) 27 Pac. Rep. 165; *Elk Point v. Vaughn*, 1 Dak. 113, 46 N. W. Rep. 577; *Cooley*, Const. Lim. 343, 474; *Black*, Const. Prohib. § 65.

stitution, cannot be sold, given away, or relinquished.”⁶¹ This principle is productive of important consequences in the frequent changes of state policy with respect to liquor legislation. But it has always been applied by the courts without hesitation, whatever might be the apparent hardship of its operation. Thus, if a state adopts the system of total prohibition, either by constitutional amendment or by act of the legislature, it is without doubt a legitimate exertion of its police power; and although the law, by its terms, takes effect upon persons holding unexpired licenses at the time of its passage, and thus deprives them of a privilege previously granted upon consideration paid, it is not, in such application, invalid. It operates as a revocation of such licenses. But as a license is neither a contract nor property, the holders cannot complain that the obligation of contracts is impaired or that they are unduly deprived of their property.⁶² The same rule applies upon the adoption of a local option law. It has the effect to revoke and annul all existing and unexpired liquor licenses in the localities where it takes effect. And it is not unconstitutional in its effect upon such permits.⁶³ Furthermore, it follows from this conception of a license that it does not imply any exemption from the addition of new or more stringent regulations to those already incumbent upon the licensee. If the authorities see fit to burden the traffic with greater duties or responsibilities, they are not obliged to make an exception in favor of the holders of existing licenses. For such privileges remain at all times subject to public control, as the exigencies or the interests of the community may require. If one holds a liquor license from the state or county, that does not prevent a municipal corporation, within whose limits his business is conducted, from requiring him to pay a fee and take out a license from its own authorities.⁶⁴ And it has been held that where one had procured a license to sell liquors in a city for a year, on payment of the designated sum, the city, before the end of the year,

⁶¹ Metropolitan Board of Excise v. Barrie, 34 N. Y. 659.

⁶² Fell v. State, 43 Md. 71, 20 Am. Rep. 83; Brown v. State, 82 Ga. 224, 7 S. E. Rep. 915; Prohibitory Amendment Cases, 24 Kans. 700, 724; Calder v.

Kurby, 5 Gray, 597. And see, *supra*, §§ 84, 90.

⁶³ *Supra*, § 101.

⁶⁴ Elk Point v. Vaughn, 1 Dak. 113, 46 N. W. Rep. 577; *supra*, § 124.

might by ordinance raise the fee for the unexpired term.⁶⁵ This was surely a strong case. And yet we cannot doubt the correctness of the decision. Finally, if the propositions already advanced are accepted as correct, it must necessarily follow that the authorities which granted a license have the power to revoke or cancel it, at any time when, in their judgment, the public good requires such action. That the authorities so hold will more fully appear in a later section.⁶⁶

§ 128. License Gives no Vested Rights.

The fact that a person has been licensed to sell intoxicating liquors does not give him a vested right in the continuance of his traffic in such liquors, in any such sense that it cannot lawfully be abridged or abrogated by subsequent legislation enacted in the exercise of the police power, and for the benefit of the interests of society.⁶⁷ "The license being a mere privilege to carry on a business subject to the will of the grantor, it is not property, in the sense which protects it under the constitution. The revocation of the license does not deprive the citizen of his liberty or his property without due process of law."⁶⁸ So it is held that payment of a liquor tax for the coming year does not exempt the dealer from the operation of a subsequent law, passed during the year, forbidding the sale of liquor on specified days.⁶⁹ There are, however, a few decisions which appear to favor the view that a liquor license is a right of property, at least in so far as that the privilege which it confers cannot be abrogated at any time without sufficient cause,⁷⁰ and that it cannot be cancelled by the mere adoption of a local option law within the district.⁷¹ But this is not in accordance with the weight of authority.

⁶⁵ Moore v. Indianapolis, 120 Ind. 483, 22 N. E. Rep. 424.

⁶⁶ *Infra*, § 189.

⁶⁷ Schwuchow v. Chicago, 68 Ill. 444; Trost v. State, 64 Miss. 188, 1 South. Rep. 49; Fell v. State, 42 Md. 71, 20 Am. Rep. 83; Metropolitan Board of Excise v. Barrie, 34 N. Y. 659.

⁶⁸ Sprayberry v. Atlanta, (Ga.) 13 S. E. Rep. 197.

⁶⁹ Reithmiller v. People, 44 Mich. 280, 6 N. W. Rep. 667.

⁷⁰ State v. Baker, 32 Mo. App. 98.

⁷¹ Watts v. Comm., 78 Ky. 329.

§ 129. Effect of Repeal of Law on Unexpired License.

From the foregoing sections it will have become apparent that, according to the generally accepted doctrine, the repeal of a law which authorized the granting of licenses (as by the adoption of prohibition or local option) will have the effect of revoking all existing and unexpired licenses.⁷² The few cases which refuse to accede to this view have not been generally approved, nor much considered in the determination of the same question elsewhere. In New Hampshire, it was at one time held that where one lawfully procures a license to sell liquor for a year, and before the expiration of the year the licensing law is repealed, the license will still remain good for the period for which it was granted, and sales made under it to the end of that period will be legal.⁷³ But this ruling is inconsistent with the later decisions of the same court.⁷⁴ In Missouri, it is thought that the repeal of a licensing law does not affect the validity of an unexpired term of a license granted under it, but takes away the power to punish the licensee, selling in virtue of it, for a violation of the repealed law.⁷⁵ In Georgia, the local option act contained an express saving of vested rights. And it was held that this embraced previously acquired rights to sell by virtue of a license already taken out and paid for, but comprehended no right either to obtain a new license, or to sell without a license, whether on the part of natural persons or corporations.⁷⁶

§ 130. License is not Assignable.

A license to sell liquor, although it confers a privilege, also imposes a species of public trust. It is of the very essence of all license laws that a principle of selection be applied to the persons who petition for the privilege, and that it be accorded only to those who possess the moral and other qualifications which tend to secure the public

⁷² See *Pleuler v. State*, 11 Nebr. 547, 10 N. W. Rep. 481.

⁷³ *Adams v. Hackett*, 27 N. H. 289, 59 Am. Dec. 376.

⁷⁴ *State v. Holmes*, 38 N. H. 225.

⁷⁵ *State v. Andrews*, 28 Mo. 14.

⁷⁶ *Menken v. Atlanta*, 78 Ga. 668, 3 S. E. Rep. 414; *Griffin v. Atlanta*, 78 Ga. 679, 4 S. E. Rep. 154.

against abuses of the right granted. These qualifications are conditions upon the issuing of licenses. It is important to the public not only that the number of liquor dealers be limited, but that the permission to sell be restricted to reputable and presumably trustworthy persons. Hence, both because public policy forbids it, and because a license is not in the nature of property, it follows that a license cannot lawfully be assigned or transferred.⁷⁷ Any attempted assignment of it would convey no rights whatever to the assignee, nor would it afford him the least protection against a prosecution for illegal selling. For example, a contract by which a licensed vendor leases to another person his tavern or his bar, and sells to the latter the privilege of retailing liquor under his license, is entirely without legal efficacy.⁷⁸ The strictness with which this rule is applied is illustrated by a case in Nebraska, where it appeared that one who held a liquor license, issued under the authority of the mayor and council of a town, sold out his saloon and assigned his license to defendant, who then petitioned the mayor and council to transfer the same to him. The council thereupon ordered the license to be transferred, and the town clerk issued a license, original in form, to defendant, who proceeded to retail liquor under it, and was indicted therefor. On this state of facts, it was held that the transfer was no defense to the indictment.⁷⁹ On the same principle, a promissory note, a part of the consideration for which is the transfer of a liquor license, is to that extent without valid consideration.⁸⁰ And because a retailer's license is personal to the holder, it follows that it cannot be committed to the care of a receiver appointed by the court; the attempt to place a liquor-dealer's business in the hands of a receiver would result, for this reason, in its entire destruction.⁸¹

⁷⁷ *In re Blumenthal*, 125 Pa. St. 412, 18 Atl. Rep. 395; *State v. County Comm'rs*, 22 Fla. 1; *Heath v. State*, 105 Ind. 342, 4 N. E. Rep. 901; *Godfrey v. State*, 5 Blackf. 151; *Lewis v. United States*, 1 Morris, 199; *Alger v. Weston*, 14 Johns. 231; *Semple v. Flynn*, (N. J. Ch.) 10 Atl. Rep. 177; *State v. McNeeley*, 1 Winst. Eq. 234; *Comm. v. Bryan*, 9 Dana, 310; *State v. Lydick*, 11 Nebr. 366, 9 N. W.

Rep. 560; *In re Templeton*, 4 Lancast. Law Rev. 242.

⁷⁸ *Comm. v. Bryan*, 9 Dana, 310; *Sanderson v. Goodrich*, 46 Barb. 616.

⁷⁹ *State v. Lydick*, 11 Nebr. 366, 9 N. W. Rep. 560.

⁸⁰ *Strahn v. Hamilton*, 38 Ind. 57.

⁸¹ *Semple v. Flynn*, (N. J. Ch.) 10 Atl. Rep. 177.

§ 131. License does not Pass to Administrator.

The authorities hold that a license to sell intoxicating liquors, being personal to the holder and not in the nature of property, does not pass to his personal representatives at his death, nor authorize them to make sales.⁸² And since the license was not such a right as the decedent himself could have transferred to any person, and as the executor or administrator is not the person who was selected by the licensing authorities as a suitable person to receive the grant of the privilege, these decisions are clearly right. But we understand the rule to mean no more than that the representative is not authorized, by his decedent's license, to continue the business, buying and selling, for the benefit of the estate, nor even to dispose by retail of the stock remaining on hand. But if he undertakes to transfer the whole stock in bulk, or in large quantities, to one or more purchasers, that is not the kind of sale contemplated by the license laws, and in that case, it would appear, he should not be required to take out a license in his own name.⁸³

§ 132. License Protects Servant or Agent.

While it is the rule, as already stated, that a license to sell intoxicating liquors is not transferable, yet there is nothing to prevent the licensee from employing others to conduct his business, so long as it remains under his own supervision and control. A licensed vendor may carry on the business, at the place designated, by a servant or agent, and the latter will be fully protected by his master's license.⁸⁴ A license having been granted to one man to keep a tavern in a particular house, and he having removed from it, another man, being indicted for retailing liquor in the same house, may prove in defense that he did it as the agent or partner of the licensee and under the latter's license.⁸⁵ In Kansas, it is held that a liquor-dealer, having

⁸² *United States v. Overton*, 2 Cranch, C. C. 42; *In re Blumenthal*, 125 Pa. St. 412, 18 Atl. Rep. 395.

⁸³ See *Williams v. Troop*, 17 Wis. 463.

⁸⁴ *Runyon v. State*, 52 Ind. 320; *Peo-*

ple v. Buffum, 27 Hun, 216; *Duncan v. Comm.*, 2 B. Mon. 281, 38 Am. Dec. 152.

⁸⁵ *Barnes v. Comm.*, 2 Dana, 388.

a license from the city or county in which his store is kept, may send out agents and take orders in any part of the state for goods to be selected and forwarded from the stock kept in such store, and that he is not required to obtain a license from the authorities of each city or county in which contracts are made therefor by such agents.⁸⁶ But in Michigan, where the law forbids the licensee to carry on the business in any other place than that specified in the bond, it is held that one who, without paying the tax, carries on the business in one place, as the agent of a person who has paid for and is carrying it on in another, is properly convicted of a violation of the law.⁸⁷ And indeed the license laws, as a rule, do not authorize the maintenance of more than one establishment, in the same locality or elsewhere, under cover of the same license. Furthermore, where it is apparent that a pretended appointment of a person as a liquor-seller's agent was in reality intended as a sale or transfer of the privilege granted by the license, it will be ineffectual, and the license will afford the pretended agent no protection against the criminal law.⁸⁸ Thus, where A. obtained a license to keep a tavern, and B. agreed to pay for the license, and sold liquors in an adjoining room, which he rented from a third person, not being at all under the control of A., it was held that B. was not protected by A.'s license, but was liable for keeping a tippling-house.⁸⁹

§ 133. Removal of Principal from State.

It is held that the removal of a licensed retailer of liquors to another county does not abrogate his license, nor expose his clerk or agent to an indictment for continuing his business, after such removal, on the same premises.⁹⁰ But it appears that a licensee who voluntarily removes from the state, thereby abandons and forfeits his rights under the license, and cannot thereafter continue the business by means of an agent. The permit is forfeited by the holder because he has ceased to possess the required qualification of residence. And

⁸⁶ *Haug v. Gillett*, 14 Kans. 140.

⁸⁷ *People v. Lester*, 80 Mich. 643, 45 N. W. Rep. 492.

⁸⁸ *Heath v. State*, 105 Ind. 342, 4 N. E.

Rep. 901. Compare *Keiser v. State*, 58 Ind. 379.

⁸⁹ *Comm. v. Branamon*, 8 B. Mon. 374.

⁹⁰ *Thompson v. State*, 37 Ala. 151.

having been abandoned and forfeited by the principal, to whom it was granted, it is no protection to one who claims to act as his agent in selling liquor.⁹¹ There are, however, certain cases in which it has been held that the absence of the principal from the state, in the military service of the country, though for an indefinite time, did not work such a forfeiture of his rights under his license that he could not lawfully appoint an agent to carry on his business during his absence; and that, in such circumstances, it would not be necessary for the agent to take out a license in his own name.⁹²

§ 134. Rights of Partners under License.

Although it is in general permissible to grant a license to two persons jointly, yet a license granted to one person, who forms a partnership with an unlicensed person, does not authorize the latter to make sales.⁹³ And where the firm already exists, a license to one partner individually will confer no authority on his copartner or the firm. "A license to retail affords protection only for those acts which, in law, are merely the acts of the person to whom it was granted. If it is granted to an individual, it affords protection only for those acts which, in law, are merely his acts as an individual. If it is granted to a partnership, it affords protection only for those acts which, in law, are the acts of the firm. A license to an individual cannot be a license to a partnership."⁹⁴ And on the same principle, a license issued to a firm, of which a given person is a member, confers no authority to sell on another firm of which also the same person is a member.⁹⁵ But where a license is issued to a firm, and before its expiration, one partner acquires the interests of the other partners in the firm's business and property, he may continue to sell under the firm's license.⁹⁶ And so also, a license granted to two persons as part-

⁹¹ *Krant v. State*, 47 Ind. 519.

⁹² *Pickens v. State*, 20 Ind. 116; *State v. McNeeley*, 1 Winst. Eq. 234.

⁹³ *Shaw v. State*, 56 Ind. 188; *Comm. v. Hall*, 8 Gratt. 588. But in an action brought to recover back the price paid for liquor sold in violation of law, it will be presumed that the sale was made

by the partner who had a right to sell; if the fact was otherwise, it must be proved. *Webber v. Williams*, 36 Me. 512.

⁹⁴ *Long v. State*, 27 Ala. 32.

⁹⁵ *Wharton v. King*, 69 Ala. 365.

⁹⁶ *United States v. Davis*, 37 Fed. Rep.

ners will justify one of them in making sales, although the other has retired from the firm. Upon this point the court in North Carolina very justly remarks that the continuance of the business by the remaining partner "will not authorize an improper person to retail, because the moral qualifications of the retailer have already been examined into and passed upon by the county court. In this respect it differs essentially from the case of an assignee, or of the personal representative of a licensed person, claiming the right to sell under the license. Such claim would be rejected, for the obvious reason that the claimant would not have the sanction of the county court. But that reason would not apply to the case of a surviving partner, and does not apply to the case of the present defendant, who is a remaining partner."⁹⁷

§ 135. Statutory Authority for Transfer of License.

In some of the states, it is provided by statute that if one licensed to sell liquor shall cease selling, his license may be transferred to another person by the authority granting the same. In such case, and where it is further provided that the court charged with the duty of issuing licenses shall have a discretionary power as to their grant or refusal, it is held that an application for such a transfer is addressed to the court's discretion, and that one who has had a hearing in such court is not entitled to *mandamus* to compel the granting of the transfer.⁹⁸ It is also held that any person who may feel that he would be aggrieved by the granting of such application is entitled to have himself made a party and to contest the same.⁹⁹

§ 136. Sales under Expired License.

If a person holding a license to retail liquors sells or offers to sell after his license expires, and without procuring its renewal, it is a violation of law for which he is liable. And it is no defense to say

468; *United States v. Glab*, 1 McCrary, 166.

⁹⁷ *State v. Gerhardt*, 3 Jones, (N. Car.) 178.

⁹⁸ *In re Blumenthal*, 125 Pa. St. 412, 18 Atl. Rep. 395.

⁹⁹ *Lester v. Price*, 83 Va. 648, 3 S. E. Rep. 529.

that he sold only such liquor as remained in stock at the time and added nothing to his store. When the period stated in a license issued to exercise a business for a specific time expires, the license expires, no matter what stock he may still have on hand, and all further sales are unlawful.¹⁰⁰

§ 137. Invalid License no Protection.

If a liquor license was improvidently or unlawfully issued,—as, where it was granted without the written recommendation which the statute makes a jurisdictional requisite,—the person obtaining such license is not thereby protected from indictment.¹⁰¹ But it is ruled that a license which appears on its face to have been regularly and duly issued cannot be impeached collaterally, as having been improperly granted. So long as it remains unreversed, and not appealed from, it must be regarded as a valid license.¹⁰² According to the practice in Illinois, an information in the nature of a *quo warranto* lies to determine the right of a person to keep a dram-shop under a license alleged to be invalid.¹⁰³

PART III. WHAT PERSONS ARE REQUIRED TO BE LICENSED.

§ 138. Persons Eligible to be Licensed.

It may be stated as a general rule that all persons who possess the statutory qualifications, and who bring themselves within the terms of the law, are entitled to obtain liquor licenses. In some of the states, it has been thought proper to restrict this privilege to citizens, or to persons who have resided within the state for a certain number of years. Such discrimination against non-residents is a justifiable and proper measure of self-protection, under the police power of the state, and cannot be characterized as an unconstitutional abridgment of the rights of citizens of the United States.¹⁰⁴

¹⁰⁰United States v. Angell, 11 Fed. Rep. 34.

¹⁰¹State v. Moore, 1 Jones, (N. Car.) 276.

¹⁰²Comm. v. Graves, 18 B. Mon. 33.

¹⁰³Handy v. People, 29 Ill. App. 99.

¹⁰⁴*Supra*, § 48.

As to residence in the district where the business is to be carried on, the laws of the various states are not uniform. Each case must be governed by the particular statute applicable. For the most part, the laws do not favor the granting of licenses to persons not resident in the county, or town, or ward, where the dram-shop is to be kept. But where, as in Indiana, it is provided that "any male inhabitant," having certain other qualifications, may obtain a license, it is held that any male inhabitant of the state is intended, without regard to his residence in the county or town in which he may desire to obtain a license.¹⁰⁵ In some states, licenses may be granted only to persons who are keepers of hotels or inns, provided with a certain number of rooms for the accommodation of travelers. But in New Jersey, it is said that the applicant for a license is not required to be an inhabitant of the house in which he contemplates keeping an inn.¹⁰⁶ In New York, there is a statute making it unlawful for "police officials" to be interested in the manufacture and sale of spirituous liquors. But it is held that the mayor of a city, though *ex officio* head of its police, does not come within that designation;¹⁰⁷ nor does an alderman, although, as a member of the common council, he shares in the power of that body to appoint and remove policemen.¹⁰⁸

§ 139. What Persons must Take out License.

The rule is, that all persons who engage in the business of selling intoxicating liquors, or who make such selling a part of their business, or who follow a business which customarily includes such selling, must procure a license from the proper authorities. Thus, a druggist, if he sells liquor, must procure a license, unless his avocation is specially excepted by the statute.¹⁰⁹ So a grocer who sells liquor is subject to the license law as well as a saloon-keeper.¹¹⁰

¹⁰⁵ *Ex parte Laboyteaux*, 65 Ind. 545.

¹⁰⁶ *State v. Hill*, 52 N. J. Law, 326, 19 Atl. Rep. 789.

¹⁰⁷ *People v. Gregg*, (Sup.) 13 N. Y. Supp. 114, 35 N. Y. St. Rep. 757.

¹⁰⁸ *People v. Hannon*, (Sup.) 13 N. Y. Supp. 117, 35 N. Y. St. Rep. 117.

¹⁰⁹ *Brown v. State*, 9 Nebr. 189, 2 N. W. Rep. 214.

¹¹⁰ *State v. Brackett*, 41 Minn. 33, 42 N. W. Rep. 548. But in Kentucky, one

And so is a confectioner.¹¹¹ Again, the conductor of a Pullman railroad car who, without a license, sells drinks to passengers at a bar in the car, is liable to indictment. In making this ruling, the court in Texas remarked: "Whenever one of these palace cars crosses the line into this state, it is within the jurisdiction of the laws of the state, and all persons who are transported by it are subject to those laws, and as much bound to obey them as any citizen of the state."¹¹² Yet, as the object of the license laws is to suppress intemperance as far as possible, and diminish the evils of tippling, there are obviously cases, where liquor is sold, which do not come within the spirit or the letter of the statute, and where other considerations of public interest forbid the application of such statute. For example, if an officer levies upon a quantity of liquor and sells it under an attachment or execution, he is not required to take out a license for such sale.¹¹³ So it is held that, by an assignment in insolvency, the debtor's liquor passes like other property not exempt from attachment, and the assignee can lawfully sell the same and maintain an action to recover the price.¹¹⁴ A license, as we have previously stated, is not assignable and does not pass to the personal representatives of the holder at his death. For this reason, an administrator would not be authorized to carry on the business of his decedent under the latter's license. The administrator is not the person who was selected as suitable to be intrusted with the privilege; his qualifications have never been judicially ascertained. And even if he merely disposed of the stock of liquors remaining in hand, if he did so at retail and in the way of carrying on the business, the same reasoning and principles would apply. But if the administrator, in the process of reducing the assets to cash, sold the stock of liquor at public sale, or sold it privately to one or more purchasers, in large quantities, either for money or in composition of debts of the estate, then the sale would

not a merchant may, without a license, sell whisky in small quantities not to be drunk on the premises. *Comm. v. Wheeler*, 79 Ky. 284.

¹¹¹*New Orleans v. Jané*, 34 La. Ann. 667.

¹¹²*La Norris v. State*, 13 Tex. App. 33, 44 Am. Rep. 699.

¹¹³*Wildermuth v. Cole*, 77 Mich. 483, 43 N. W. Rep. 889; *State v. Johnson*, 33 N. H. 441. But compare *Nichols v. Valentine*, 36 Me. 322.

¹¹⁴*Gignoux v. Bilbruck*, 63 N. H. 22.

not be such as is contemplated by the license law, and we see no reason why such law should apply.¹¹⁵ It is the *traffic* in liquor which requires a license, not merely the transfer of property in it. Thus the case supposed would be analogous to the cases of sales by sheriffs and by assignees in insolvency, above cited, and should be governed by the same principles.

§ 140. Wholesalers.

The statutes generally make a distinction between licenses to sell at wholesale and licenses to sell at retail, in respect to the qualifications of the applicant, the amount of the fee required, and other particulars. But if the law is so framed as to prohibit the sale of liquor in any quantity without a license, wholesale dealers are subject to it equally with retailers, and no one can excuse himself for the want of a license merely by showing that he sold only in large quantities.¹¹⁶ In Minnesota, it has been held that the laws regulating the sale of intoxicating liquors do not apply to exclusively wholesale dealers, who sell to other dealers, so as to oblige them to take out licenses.¹¹⁷ But later rulings in the same state are to the effect that the necessity of obtaining a license depends solely upon whether the sale is of a quantity less than five gallons, and not at all on the character of the seller's business.¹¹⁸ In Michigan, where payment of the manufacturer's tax exempts the person from paying the wholesale tax, and where the amount of tax for "selling at wholesale," "selling at retail," or "selling at wholesale and retail" is the same, it is held that one who has paid the manufacturer's tax, but no retail tax, is not authorized to sell at retail the liquor which he himself manufactures.¹¹⁹

¹¹⁵ See *Williams v. Troop*, 17 Wis. 463. And see *supra*, § 131.

¹¹⁶ *State v. Turner*, 18 S. Car. 103; *State v. Cummings*, 17 Nebr. 311, 22 N. W. Rep. 545. See, also, *State v. Benz*, 41 Minn. 30, 42 N. W. Rep. 547; *State v. Brackett*, 41 Minn. 33, 42 N. W. Rep. 548; *Hunter v. State*, 79 Ga. 365, 5 S. E. Rep. 134.

¹¹⁷ *State v. Orth*, 38 Minn. 150, 36 N. W. Rep. 103.

¹¹⁸ *State v. Schroeder*, 43 Minn. 231, 45 N. W. Rep. 149; s. c. 45 Minn. 44, 47 N. W. Rep. 308.

¹¹⁹ *People v. Greiser*, 67 Mich. 490, 35 N. W. Rep. 87.

§ 141. Manufacturers.

As a general rule, under the laws obtaining in most of the states, a manufacturer of intoxicating liquors cannot engage in the retail trade, even though he sells only the products of his own still or brewery, without taking out a license as a retailer.¹²⁰ And a brewer who establishes an agency for the sale of beer of his own manufacture in a town some miles from his duly licensed place of business, and there sells to such persons as may desire to purchase, without obtaining a license for carrying on the business from the authorities of such town, is guilty of an offense.¹²¹ But a brewer of beer is not one "engaged in distilling and rectifying alcoholic or malt liquors," within the meaning of a statute imposing on such persons a special tax.¹²² But, under the laws of Tennessee, it is held that one who sells wine made from grapes raised on his own farm, in quantities less than a quart, is a retail dealer.¹²³ And a similar ruling has been made in Virginia;¹²⁴ although a contrary rule obtains in some other states.¹²⁵

§ 142. Social Clubs.

Whether or not a social club, such as are now very common in all the larger cities, may lawfully furnish liquor to its members, as a part of the entertainment which it provides for them, without procuring a license or paying a tax as a retailer, is a question which has provoked great discussion of late years, and upon which the authorities are by no means harmonious. The matter is of sufficient interest and importance to require a detailed examination of the adjudged cases, and a full consideration of the principles of law which are applicable to it. One of the leading decisions on this topic was made in the English case of *Graff v. Evans*.¹²⁶ It there appeared that the

¹²⁰ *Keller v. State*, 11 Md. 525, 69 Am. Dec. 226; *State v. Schroeder*, 43 Minn. 231, 45 N. W. Rep. 149. See *State v. Stiefel*, (Md.) 22 Atl. Rep. 1.

¹²¹ *Pietz v. State*, 68 Wis. 538, 32 N. W. Rep. 763.

¹²² *State v. Weckerling*, 33 La. Ann. 36.

¹²³ *Kurth v. State*, 87 Tenn. 134, 5 S. W. Rep. 593.

¹²⁴ *Clemmens v. Comm.*, 6 Rand. 681.

¹²⁵ *State v. Jaeger*, 63 Mo. 403.

¹²⁶ L. R. 8 Q. B. Div. 373.

appellant was the manager of an institution carried on in good faith as a club, under rules by which members paid an entrance fee and subscriptions; trustees were appointed in whom all the club property was vested, and there was a committee of management, for whom the appellant acted, to conduct the general business. The club was not licensed for the sale of intoxicating liquors, but these were supplied to members at fixed prices, including a certain advance upon the cost, the money produced thereby going to the general funds of the club. The appellant, in the course of his employment as manager, supplied intoxicating liquors to a member, (who paid for them,) and was indicted therefor. It was held that he did not "sell liquor by retail," within the meaning of the licensing act, and was not liable to conviction. And the same rule is held, on substantially similar facts, in the state of Massachusetts.¹²⁷

In Maryland, we find the well considered case of *Scim v. State*,¹²⁸ in which it was held that the officers of a social club, whose steward furnishes the members with food, and with beer by the glass, at a fixed price, to be consumed at the club, the money so received being used for the expenses of the club, are not guilty of "selling" beer on Sunday, within the meaning of the law. From the opinion in this case, by Bartol, C. J., we quote as follows: "The society is not an ordinary corporation, but a voluntary association or club united for social purposes; each member must be elected, and each is joint owner of the property and assets, and entitled to the privileges of the society so long as he remains a member. Among these privileges is that of partaking of the provisions and refreshments provided for the use of the members. These are not *sold* to him by the corporation, but furnished to him by the steward, upon his paying into the common fund what is equivalent to the cost of the article furnished, and what is so paid is expended in keeping up the supply for the use of the members. Such a transaction is not a barter or sale in the way of trade, and therefore not within the meaning or purview of the act."

¹²⁷ Comm. v. Pomphret, 137 Mass. 564, 50 Am. Rep. 340; Comm. v. Ewig, 145

Mass. 119, 13 N. E. Rep. 335; Comm. v. Geary, 146 Mass. 139, 15 N. E. Rep. 363.

¹²⁸ 55 Md. 566, 39 Am. Rep. 419.

In Tennessee also, a club similarly organized and maintained is held not subject to taxation as a retail liquor dealer. In the language of the court, "It cannot be controverted that the complainant would have a right to purchase and keep liquor at its club-rooms for the use of its members, and to distribute it among them in any method it might deem proper, and to raise funds for the purpose of replenishing by assessments upon the members; and the mode adopted, of the form of a sale to its members alone of such a quantity for so much money, can be nothing more than a mode adopted of assessing each member in proportion to the amount he consumes, and cannot be distinguished in principle from that adopted in one of the cases referred to, of issuing checks to each member, which entitle him to so much liquor each, according to the amount of money he contributes."¹²⁹

In another case, it has been justly observed that "the property of the club becomes the joint property of its members, and the furnishing of liquors or wines to the members by the steward is not a violation of the statute; and we do not understand that the entertaining of a guest or friend by a member, with wines or liquors, at the club-house, would be any more a violation of the statute than it would if such entertainment was given at his private residence."¹³⁰

And the same doctrine has been adopted by the courts in some of the other states.¹³¹

¹²⁹ *Tennessee Club v. Dwyer*, 11 Lea, 452, 47 Am. Rep. 298.

¹³⁰ *People v. Andrews*, 50 Hun, 591, 3 N. Y. Supp. 508. This decision was overruled in 115 N. Y. 427, 22 N. E. Rep. 358, but the reasoning above quoted is, to the mind of the present writer, more satisfactory than that of the appellate court.

¹³¹ *Piedmont Club v. Comm.*, (Va.) 12 S. E. Rep. 963. In this case it was said: "The question to be determined is whether, upon the facts above stated, the defendant club was guilty of selling liquor, within the meaning of the statute. The question is of first impression in this state, but we entertain no doubt

that the case is with the defendant; that is to say, that there has been no sale, within the meaning of the statute. Every statute is to be construed, if possible, according to the intention of the legislature, and criminal statutes are to be construed strictly. *Harris' Case*, 81 Va. 240. In the present case it is conceded that the defendant club is a *bona fide* club, organized for the purposes mentioned in its charter, and not as a mere device resorted to as a means of evading the law. None but members or invited guests are entitled to the privileges of the club, and no person not a member of the club is permitted to pay for either food or drink or other

On the other side of the question there is arrayed a very respectable body of authorities, although, as we shall seek to show, several of the decisions which are usually cited as sustaining the rule that all clubs dispensing liquors must be licensed, are not applicable to societies organized in good faith and without intent to evade the law. In North Carolina, a decision has been reached which is squarely opposed to the authorities above cited. In a case where it appeared that a number of persons had organized a club for social and literary purposes, and that incidentally the members, but no other persons, were permitted to purchase from the defendant (its steward) meals, cigars, and liquors, which were furnished by the club at a price fixed by its officers, sufficient to cover the cost, but not for the purpose of profit, it was held that the furnishing of liquors to members of the club, under these circumstances, was a sale, in violation of the local option law.¹³² And similar rulings have been made in New York, New Jersey, Alabama, and Michigan.¹³³

refreshments dispensed by the club. The moneys received for all liquors so dispensed go into the general fund, which are again used for replenishing the stock. No profit is made on the liquor. In fact, the receipts from that source are not sufficient to reimburse the club for the cost of the liquors and of serving them. The liquors so purchased, as already stated, are for the exclusive use of the members of the club and their invited guests, and what is complained of as an unlawful selling in the present case is, we think, nothing more than an equitable mode by which the cost of the liquor used by members of the club is divided among them in proportion to the quantity which each member uses. This was the view taken by the supreme court of Tennessee in a case the facts of which were very similar to those of the case at bar. . . . *Tennessee Club v. Dwyer*, 11 Lea, 452. To the same effect is *Seim v. State*, 55 Md. 566. See, also, *Graff v. Evans*, 8 Q. B. Div. 373; *Com. v. Pomphret*, 137 Mass. 564; 11 Amer. & Eng.

Enc. Law, p. 727. Besides these, a number of cases were cited at the bar, but we deem it unnecessary to comment upon them. The case depends upon the true construction of our own statute, and we are clearly of opinion that if, in the present case, there can be said to have been, in the strictest or most technical sense, a sale at all, it was not such a sale as is contemplated by that statute. The defendant club, in dispensing liquors to or at the expense of its own members, was not engaged in carrying on the business of selling liquor, and the liquor license is required of those persons only who sell or offer to sell liquor as a business." And see, also, *Barden v. Montana Club*, (Mont.) 25 Pac. Rep. 1042; *State v. McMaster*, (S. Car.) 14 S. E. Rep. 290.

¹³² *State v. Lockyear*, 95 N. Car. 633; *State v. Neis*, 108 N. Car. 787, 13 S. E. Rep. 225.

¹³³ *People v. Andrews*, 115 N. Y. 427, 22 N. E. Rep. 358; *People v. Sinell*, (Sup.) 12 N. Y. Supp. 40; *People v. Bradley*, (Sup.) 11 N. Y. Supp. 594; *State v.*

One of the decisions of the supreme court of Indiana is much relied on as an authority in line with those just cited. But it appeared that the society there in question met every Sunday, for the purpose of consuming a keg of beer which had been bought by the treasurer the day before, with funds raised partly by monthly assessments on the members and partly by the sales of beer, at a fixed price, at the weekly assemblies. It will thus be seen that the sale and consumption of liquor was the very purpose for which the club was organized, and therein the case is to be distinguished from those already examined. The court held—and very properly—that the treasurer was indictable for selling beer on Sunday. But the ground of the decision appears in the following sentences from the opinion: "If the transaction set out in the agreed statement of facts be not an evasion and violation of the law, then a number of persons may do that lawfully which, if done by one person, would be unlawful. It would be a reproach of the law and its administration if a combination of persons could, by such an arrangement, evade the law and thwart the legislative will."¹³⁴

There is also a case in the Kansas reports, which will be found, on examination, to belong in the same category as the foregoing. It was the case of an association which purchased beer outside the state and brought it into the state, and then sold chips to its members, each chip representing a drink of beer, and then furnished a drink of beer for each chip returned by a member. This, in a prohibition state, was so plainly a mere device to evade the law that the court could not have refused to rule that the persons concerned in it were liable to punishment.¹³⁵

The decisions in Iowa, while apparently against the right of a club

Essex Club, (N. J. Sup.) 20 Atl. Rep. 769; *Martin v. State*, 59 Ala. 34; *People v. Soule*, 74 Mich. 250, 41 N. W. Rep. 908. See, also, *Kentucky Club v. Louisville*, (Ky.) 17 S. W. Rep. 743. These cases all proceed on the theory that such a transaction is strictly and technically a sale. In view of the authorities cited above, this is very doubtful. But even conceding it to be so, it is clearly not

the species of sale contemplated by the license laws. Those statutes are intended for the restriction and regulation of grog-shops, and, properly considered, have no application to the management of clubs organized by gentlemen for social or other purposes.

¹³⁴ *Marmont v. State*, 48 Ind. 21.

¹³⁵ *State v. Horacek*, 41 Kans. 87, 21 Pac. Rep. 204.

to furnish liquor to its members, will be found, on closer scrutiny, to have been made in cases where it was necessary to frustrate an attempt to evade the law. Thus, in one of these cases, it was shown that the object of the club "was to supply its members with intoxicating liquors to be used as a beverage," and that "defendant had possession of the liquors used, and sold tickets to members of the club, which were exchanged for or given in payment of intoxicating liquors drank in defendant's house by the members of the club presenting the tickets." And the court characterized the scheme of organization as "a rather clumsy device by which the defendant and the members of the 'social club' hoped to defeat the law and establish a place of resort where they could be supplied with intoxicating liquors for unlawful use."¹³⁶

In the case of *Rickart v. People*,¹³⁷ it appeared that an association, formed for the avowed purpose of promoting temperance and friendship, claimed to have bought a certain dram-shop, belonging to a person who became a member and treasurer of the society. This person continued in possession of the dram-shop, having no license to sell liquor. Each member was required to pay one dollar, for which he received a ticket, with the numbers from one to twenty inclusive upon it, and upon presenting this ticket at the bar, the member received liquors or cigars, as he wished, and paid for the same by having numbers punched out of his ticket, each number representing five cents. *Any person could become a member by paying one dollar.* The treasurer received all the money, rendering no account to the other members, and bought all liquors and cigars. It was held that the jury were warranted in finding that this was but a device to evade the law, and that the treasurer was guilty of unlawfully selling liquor. The words italicized above will show why this ruling was right, and how it is to be distinguished from the case of a *bona fide* social club.

¹³⁶ *State v. Mercer*, 32 Iowa, 405. The subsequent case of *Stewart v. Waterloo Turn Verein*, 71 Iowa, 226, 32 N. W. Rep. 275, did not involve the question of the necessity of a club having a li-

cense to sell liquor, but turned on the liability of a corporation to prosecution in a quasi-criminal action.

¹³⁷ 79 Ill. 85.

In Maryland, the later decisions might appear to be antagonistic to the rule in *Seim v. State*, above cited. For they hold that an incorporated club is liable for providing liquors, and keeping them in its possession at its rooms, for the purpose of supplying them to its members as they may be called for.¹³⁸ But it is to be noted that these cases were adjudged under a later statute, much more comprehensive and stringent in its terms, and which, as has been suggested, was probably intended to meet the case of just such associations as that which was in question in *Seim v. State*. The statute referred to provides that "no person or persons, company, corporation, or association, shall deposit, or have in his, her, their, or its possession any spirituous or fermented liquors or alcoholic bitters or intoxicating liquors, with intent to sell or give away the same."¹³⁹ In addition to the authorities already adduced, several other cases may be cited in support of the rule that the question to be considered is, whether the facts in evidence amount to an evasion of the law, or a device or attempt at such evasion, and that this is a question of fact for the jury.¹⁴⁰

Upon the whole, therefore, notwithstanding some conflicting rulings, the rational conclusion is that the intent must govern. On the one hand, if the object of the organization is merely to provide the members with a convenient method of obtaining a drink whenever they desire it, or if the form of membership is no more than a pretense, so that any person, without discrimination, can procure liquor by signing his name in a book or buying a ticket or a chip, thus enabling the proprietor to conduct an illicit traffic, then it falls within the terms of the law. But on the other hand, if the club is organized and conducted in good faith, with a limited and selected membership, really owning its property in common, and formed for social, literary, artistic, or other purposes, to which the furnishing of liquor to its members would be merely incidental, in the same way and to the same extent that the supplying of dinners or daily papers

¹³⁸ *Chesapeake Club v. State*, 63 Md. 446; *State v. Easton Social Club*, (Md.) 20 Atl. Rep. 783.

¹³⁹ Acts Md. 1882, c. 112.

¹⁴⁰ *Comm. v. Smith*, 102 Mass. 144; *People v. Andrews*, 50 Hun, 591, 3 N. Y. Supp. 508; *United States v. Wittig*, 2 Low. 466.

might be, then it cannot be considered as within either the purpose or letter of the law. This rule is developed, with much clearness and force, in an opinion of the supreme judicial court of Massachusetts, as follows: "It is well known that clubs exist which limit the number of the members and select them with great care, which own considerable property in common, and in which the furnishing of food and drink to the members for money is but one of many conveniences which the members enjoy. If a club were really formed solely or mainly for the purpose of furnishing intoxicating liquors to its members, and any person could become a member by purchasing tickets, which would entitle the holder to receive such intoxicating liquors as he called for, upon a valuation determined by the club, the organization itself might show that it was the intention to sell intoxicating liquors to any person who offered to buy, and the sale of what might be called a temporary membership in the club, with a sale of the liquors, would not substantially change the character of the transaction. One inquiry always is, whether the organization is *bona fide* a club with limited membership, into which admission cannot be obtained by any person at his pleasure, and in which the property is actually owned in common, with the mutual rights and obligations which belong to such common ownership, under the constitution and rules of the club, or whether, either the form of a club has been adopted for other purposes, with the intention and understanding that the mutual rights and obligations of the members shall not be such as the organization purports to create, or a mere name has been assumed without any real organization behind it."¹⁴¹ In point of fact, the use of a form of organization as a social club, for the purpose of cloaking the operations of an illicit grog-shop or the maintenance of a society for tippling purposes, became so common in some of the states that it was found necessary to provide against it by law.¹⁴² In Massachusetts, the statute provides that "all buildings or places used by clubs for the purpose of selling, distributing, and dispensing intoxicating liquors to their members shall be deemed common nuisances." This law, it is held, applies to a place used by

¹⁴¹ Comm. v. Pomphret, 137 Mass. 564.
50 Am. Rep. 340.

¹⁴² See, for instance, St. Mass. 1887, c. 206; Laws R. I. 1887, c. 634, § 14.

an incorporated club to procure for and dispense to its members intoxicating liquor bought for and belonging to them individually.¹⁴³

§ 143. License to Joint Parties.

There is nothing in the character of a license, or in the policy of the law applicable to it, which would prevent its being issued to two or more persons jointly, if the words of the statute will warrant it. Thus, in New Jersey, where the act authorizes the grant of "licenses to persons to keep inns," it is held to allow the grant of a license to more than one person, although, elsewhere in the statute, the licensee is always referred to in the singular number.¹⁴⁴

PART IV. FORM AND CONDITIONS OF LICENSE.

§ 144. Form of License.

A license to sell liquor is required to be in writing. A person indicted for unlawful selling cannot justify under a parol license from the proper officer, though he has paid the required fee.¹⁴⁵ And in order to protect himself, he must show a license signed by one having authority to grant it.¹⁴⁶ The certificate of the clerk of the county commissioners, that a person has been licensed by them, is not *per se* a license; nor is it conclusive evidence of the grant of such license, but it may be controlled by the records of the commissioners.¹⁴⁷ But in Arkansas it is held that where a party has a license signed by the clerk and authenticated by the seal of the county, and countersigned by the collector, he has all that the law requires him to have, and the presumption will be that the county court authorized the issue of the license upon a proper petition presented to it.¹⁴⁸ The license granted, however, is the paper issued to the licensee, and not the vote or order under which the paper is issued. Hence evidence is

¹⁴³ Comm. v. Baker, (Mass.) 25 N. E. Rep. 718.

¹⁴⁴ State v. Hill, 52 N. J. Law, 326, 19 Atl. Rep. 789.

¹⁴⁵ Lawrence v. Gracy, 11 Johns. 179. And see Pope v. State, 2 Swan, 611.

¹⁴⁶ Cronin v. Stoddard, 97 N. Y. 271.

¹⁴⁷ Comm. v. Spring, 19 Pick. 396.

¹⁴⁸ State v. Brandon, 28 Ark. 410.

not admissible, in a prosecution against the holder, to show that the licensing board had voted to correct a clerical error and omission in the paper.¹⁴⁹ Unless otherwise provided by statute, the license would probably be sufficient in form if it designated the licensee, the place of sale, the class of license, the kind of liquor covered, and the authority granting it, with reasonable certainty. But where a license appeared on its face to have been granted on payment of fifty cents, when, under the statute, no license could be granted for a less fee than five dollars, it was held to be, *prima facie*, absolutely void.¹⁵⁰ A certificate, on a license, of leave to change the place of business, must be authenticated in the same way as the original license, and by the signature of the same officers.¹⁵¹

§ 145. Designation of Place of Sale.

The laws generally require that the license shall designate the place at which the holder proposes to carry on his business under it. In some states, however, it is considered that the statutory provision that the license shall specify the house is merely directory to the officers whose duty it is to issue the license, and that if the petition for license, and the order authorizing its issuance, describe the house intended, the license itself is not void for failure to specify such house.¹⁵² In Massachusetts, however, the rule is that a license which sets forth the name of the street only, and not the building in which the business is to be carried on, will not protect the holder in making sales.¹⁵³ In the same state, under the statutes there obtaining, it is held that a retailer's license, when issued to one holding a license as an inn-keeper, need not specify the room or rooms in which the liquors are to be kept or sold.¹⁵⁴ Where the act provides that no license shall be granted to be exercised in any dwelling-house, a license which shows, in its descriptive part, that the building is occupied partly as a dwelling-house is void.¹⁵⁵

¹⁴⁹ Comm. v. Cauley, 150 Mass. 272, 22 N. E. Rep. 909.

¹⁵⁰ Townsend v. State, 2 Blackf. 151.

¹⁵¹ Comm. v. Merriam, 136 Mass. 433.

¹⁵² Goforth v. State, 60 Miss. 756.

¹⁵³ Comm. v. Merriam, 136 Mass. 433.

¹⁵⁴ Comm. v. Stratton, 150 Mass. 188, 22 N. E. Rep. 893. Compare Comm. v. Cauley, 150 Mass. 272, 22 N. E. Rep. 909.

¹⁵⁵ Comm. v. McCormick, 150 Mass. 270, 22 N. E. Rep. 911.

§ 146. Conditions in License.

All licenses are either expressly or impliedly limited by the provisions of the existing laws and ordinances, and conditioned upon their due observance. But the licensing authorities have no power to insert in a license any restriction, limitation, or condition which would be repugnant to an existing statute. Hence, for example, a clause inserted in the licenses of hotel-keepers absolutely prohibiting the sale of liquor on certain days named (on which days, by the statute, sales would not be unlawful) is unauthorized and nugatory.¹⁵⁶ But a provision in a druggist's license, that no liquors shall be sold by him or his agents to be drunk on the premises or in any place adjacent thereto, is proper and valid, where the law makes a distinction, in respect to the amount of the fee charged, between licenses to druggists and to retail dealers.¹⁵⁷

§ 147. Duration of License.

The time during which a license shall continue in force is usually fixed by the statute, either at one year from its date or until the end of the current excise year.¹⁵⁸ If the law fixes its duration at one year, the authorities have no power to grant a license for less than a year; a license for four months will not protect the holder.¹⁵⁹ Neither, in such case, can they grant a license for a longer period than one year. But it is not necessary that the time should begin and terminate with the term of office of the board which grants the license; they may grant a license to extend beyond their term of office, providing it does not exceed a year, and does not begin to take effect after their term of office has expired.¹⁶⁰ In Texas, it is held that the license will take effect from the time the applicant produces to the clerk of the county court the county treasurer's receipt for the tax imposed by law, and not from the time when the county court acted upon the application.¹⁶¹

¹⁵⁶ *In re Breslin*, 45 Hun, 210.

¹⁵⁷ *Spake v. People*, 89 Ill. 617.

¹⁵⁸ See *State v. Sumter County*, 22 Fla. 1; *Disbrow v. Saunders*, 1 Denio, 149.

¹⁵⁹ *Gurley v. State*, 65 Ga. 157.

¹⁶⁰ *Hendersonville v. Price*, 96 N. Car. 423, 2 S. E. Rep. 155.

¹⁶¹ *Brown v. State*, 27 Tex. 335.

PART V. LIMITATION OF RIGHTS SECURED BY LICENSE.

§ 148. License Subject to Existing Laws.

A liquor license is always impliedly subject to such statutes and ordinances as are lawfully in existence at the time it is granted, without words in the license expressly referring to such laws.¹⁶² In other words, the rights and privileges secured by a license do not include the right to disregard any valid law. They are such only as can be exercised in conformity with, and in subordination to, the laws already in force. Hence, when a party applies for and accepts a license under a city ordinance imposing conditions and restrictions, and the license itself contains a condition that it may be revoked at the discretion of the mayor, he thereby assents to the terms and conditions imposed, both in the license and in the ordinance.¹⁶³ A license to sell liquor for certain purposes therein specified cannot protect the licensee from a criminal prosecution for violating the laws of the state by selling liquors for other purposes than those named in the license.¹⁶⁴ So also, such a license does not authorize the holder to sell on Sunday or other prohibited days, or to minors or other prohibited persons, contrary to the provisions of the existing criminal laws.¹⁶⁵ Under a statute authorizing the county court to make an order prohibiting the sale of liquors within three miles of any college or academy in the county, when the order is made, the power vested in the court is exhausted, and it has no power to revoke the order upon a subsequent petition; and a license to sell liquor, afterwards granted, is no protection against a prosecution for selling within the prohibited limits.¹⁶⁶

§ 149. Effect of Laws Subsequently Enacted.

We have already seen that, on constitutional grounds, there is no valid objection to laws which impose additional burdens or responsibilities upon the holders of existing licenses, or subject their business

¹⁶² *Baldwin v. Smith*, 82 Ill. 162. See, also, *O'Flinn v. State*, 66 Miss. 7, 5 South. Rep. 390.

¹⁶³ *Schwuchow v. Chicago*, 68 Ill. 444.

¹⁶⁴ *State v. Adams*, 20 Iowa, 486; *Curd v. Comm.*, 14 B. Mon. 386.

¹⁶⁵ *Lambert v. State*, 8 Mo. 492.

¹⁶⁶ *Wilson v. State*, 35 Ark. 414.

to new restrictions or limitations. As a license is neither a contract nor property, such laws, in their retroactive operation, are not to be assailed as impairing the obligation of contracts or divesting vested rights. The police power of the state remains always unfettered. And the licensee takes his permit subject to the contingency that there may be changes in the laws, adopted in the exercise of that power, which will render his privilege less valuable or his responsibilities more onerous.¹⁶⁷ The fact that money has been paid for the license does not exempt the holder from the operation of subsequent police regulations.¹⁶⁸ Nevertheless, on the principle that a statute will not be construed as operating retrospectively, unless upon the clearest and most explicit expression of the legislative intention in that regard, it is held that a law concerning licenses, if not otherwise expressly provided, will be applicable only to licenses granted after it takes effect.¹⁶⁹

§ 150. Restriction as to Place of Sale.

A liquor license restricts the privilege to the place, as well as the person, licensed.¹⁷⁰ And one license to retail will not authorize the licensee to conduct the business of selling in more than one place.¹⁷¹ Thus, a license to keep a hotel or tavern in a particular house will not legalize a sale of spirits at any other place than the house and its appendages, unless it be to persons who are guests of the tavern.¹⁷² A small building, on the same lot with a dwelling house, but at a distance of forty-five rods from it, with a passage-way between them, is not within a license to sell liquor in a dwelling-house "and the apartments and dependencies thereof."¹⁷³ But the question whether two rooms in the same house, in which it is proposed to sell liquor, are in truth two distinct places, so that the applicant may be required to take out two licenses, is a question of

¹⁶⁷ *Supra*, §§ 127, 128.

¹⁶⁸ *State v. Isabel*, 40 La. Ann. 340, 4 South. Rep. 1.

¹⁶⁹ *State v. Andrews*, 26 Mo. 171.

¹⁷⁰ *State v. Prettyman*, 3 Harr. (Del.) 570.

¹⁷¹ *State v. Walker*, 16 Me. 241; *State v. Hughes*, 24 Mo. 147; *Zinner v. Comm.*, (Pa. Sup.) 14 Atl. Rep. 431.

¹⁷² *Wason v. Severance*, 2 N. H. 501; *State v. Moody*, 95 N. Car. 656.

¹⁷³ *Comm. v. Estabrook*, 10 Pick. 203.

fact; and the judgment of the licensing authorities, holding that they are distinct places, will not be disturbed on appeal, if the evidence justifies, though it may not require, that conclusion.¹⁷⁴ Where a liquor-seller has a bar in two adjoining rooms, connected by an archway in the partition wall, one for negroes and the other for white persons, only one license is required.¹⁷⁵ So a single license will protect the proprietor of a large hotel who maintains three bars in the building, screened off by partitions and connected by doorways.¹⁷⁶ But where a person had a license to sell intoxicating liquors at his stand at the corner of two designated streets, and he had another stand adjoining this, with an internal communication between the two, and he sold liquors at both, it was held that the license applied only to the first named place.¹⁷⁷ It is further to be observed that a general license to retail liquor within the county does not authorize sales to be made within the district covered by a special prohibitory law, as, for instance, within a certain distance of a church, school, or factory, if that is specially forbidden by law.¹⁷⁸

§ 151. Laws Prohibiting Sales to Particular Classes of Persons.

Since the privilege conferred by a license is not general, but special and limited in its nature, and does not include the right to violate any provision of the positive law, it follows that the license will not protect its holder in making sales to infants, intoxicated persons, habitual drunkards, or any other persons to whom the statute expressly forbids the selling or furnishing of liquor.¹⁷⁹ And it is no defense to an indictment for selling liquor to such classes of persons that the law prescribing and punishing the offense was not passed until after the defendant's license was issued; for he took the license subject not only to such laws as were then in force, but also to such as might thereafter be enacted, regulating the sale of liquor.¹⁸⁰

¹⁷⁴ Sanders v. Elberton, 50 Ga. 178.

¹⁷⁵ Hochstadler v. State, 73 Ala. 24.

¹⁷⁶ St. Louis v. Gerardi, 90 Mo. 640,
8 S. W. Rep. 408.

¹⁷⁷ State v. Fredericks, 16 Mo. 392.

¹⁷⁸ Barnes v. State, 49 Ala. 342.

¹⁷⁹ Comm. v. Tabor, 138 Mass. 496.

¹⁸⁰ Comm. v. Sellers, 130 Pa. St. 32, 18
Atl. Rep. 541.

§ 152. Requirement that License be Displayed.

It is within the undoubted jurisdiction of the legislature, in the exercise of the police power, to regulate the manner in which drinking-saloons shall be conducted, and to enact such provisions, not inconsistent with the rights and liberties of the citizen, as shall tend to facilitate the detection and punishment of illicit dealing. Hence a law which requires the holder of a liquor license, under penalties, to keep his license posted in a conspicuous place in his saloon, or in the house where his business is conducted, is a valid and constitutional enactment.¹⁸¹

§ 153. Screen Law.

In some four or five of the states we find a statute in force which provides that, during the days and times when licensed saloons are required by law to be kept closed, (or, in Massachusetts, at all times,) all screens, curtains, blinds, etc., which might prevent a clear view of the interior of the premises from the outside shall be removed, or that no such obstructions shall be "placed or maintained." This is commonly called the "screen law." It is intended to facilitate the detection of persons carrying on their business at prohibited times. The constitutionality of such a statute has not been successfully assailed. Being a reasonable and proper police regulation, it cannot be said to fall within the constitutional guaranty to private persons of security against unreasonable searches, nor does it, in any just sense, deprive the persons affected of their liberty or property without due process of law.¹⁸² Neither is it invalid because it fails to define what shall constitute an obstruction of the view, within the meaning of its terms.¹⁸³ As to the persons upon whom the screen law operates, it is held that, though the illegal act was done by the liquor-seller's servant, in his absence, this will not excuse the mas-

¹⁸¹ *Ex parte Bell*, 24 Tex. App. 428, 6 S. W. Rep. 197; *Bell v. State*, 28 Tex. App. 96, 12 S. W. Rep. 410.

¹⁸² *Robison v. Haug*, 71 Mich. 38, 38 N. W. Rep. 668.

¹⁸³ *State v. Doyle*, 15 R. I. 325, 4 Atl. Rep. 764.

ter.¹⁸⁴ And where the language of the act is that "no such licensee" shall place or maintain any screen, etc., it is considered that these words refer to every licensee, and not merely to one who has been required by the licensing board to remove screens or other obstructions from his premises.¹⁸⁵ The fact of the obstruction of a view of the interior being the substantive part of the offense, it is immaterial what purpose may have influenced the party in putting up the screens or curtains complained of, if in fact they have that effect.¹⁸⁶ And if the act is so framed as to require a clear view of "the interior of the premises," it is violated by the placing of a curtain which obstructs the view of any part of the interior, whether such part is used for the sale of liquor or not.¹⁸⁷ Further, although the particular obstruction was in place when the license was granted and took effect, that will not justify its continuance; it must be removed, or the law is violated.¹⁸⁸ If the licensee keeps his bar in a middle room in the building, to which entrance is usually had from the street by a door from the street into the front room, and thence by a door into the middle room, screens on the windows of the front room, which interfere with a view of the door into the middle room, are a violation of the law.¹⁸⁹ But the closing of a shutter over one window will not be unlawful, unless it materially interferes with a view of the interior, and whether it does or does not so interfere is a question of fact for the jury.¹⁹⁰ It is held that a board partition between two rooms is not a "device," within the meaning of a law which prohibits "blinds, screens, shades, curtains, or other devices" to obscure the view of the interior.¹⁹¹ Nor is the law violated by maintaining a partition between a front and rear room, where the license gives authority to sell in both of such rooms.¹⁹² In Massachusetts, where the language of the

¹⁸⁴ *Comm. v. Kelley*, 140 Mass. 441, 5 N. E. Rep. 834.

¹⁸⁵ *Comm. v. Rourke*, 141 Mass. 321, 6 N. E. Rep. 383.

¹⁸⁶ *Comm. v. Moore*, 145 Mass. 244, 13 N. E. Rep. 893.

¹⁸⁷ *Comm. v. Worcester*, 141 Mass. 58, 6 N. E. Rep. 700.

¹⁸⁸ *Comm. v. Sawtelle*, 150 Mass. 320, 23 N. E. Rep. 54.

¹⁸⁹ *Comm. v. Kane*, 143 Mass. 92, 8 N. E. Rep. 880.

¹⁹⁰ *Comm. v. McDonnough*, 150 Mass. 504, 23 N. E. Rep. 112.

¹⁹¹ *Schultz v. Cambridge*, 38 Ohio St. 659.

¹⁹² *Comm. v. Barnes*, 140 Mass. 447, 5 N. E. Rep. 252.

screen law is not restricted to any day or time, an attempt was made to obtain a judicial ruling that the law was not operative on Sunday, which, of course, would have defeated one of its primary purposes. A defendant, being indicted for a violation of this law, asked the court to rule that, it being unlawful for him to do business on his premises on Sunday, he had a right to close up the premises on that day, and obstruct the view to them in any manner he saw fit. The judge refused to so rule, but instructed the jury that the law applied to the manner in which the defendant kept the premises the same upon Sunday as upon any other day. And this instruction was sustained on appeal.¹⁹³ Nor does it make any difference that the licensee is not in fact carrying on business on that day.¹⁹⁴ Whether the screen law creates an offense and provides a penalty, or merely makes the license to sell subject to a condition that the acts prohibited shall not be done, will depend upon the terms of the particular statute. In Massachusetts, the former view is held.¹⁹⁵ And the mere fact that a person indicted under this law holds a license is no defense.¹⁹⁶ When the license requires the closing of entrances elsewhere than on the public street, it is forfeited by keeping open a rear door to a driveway.¹⁹⁷

PART VI. PROCEEDINGS TO OBTAIN LICENSE.

§ 154. Power to Grant Licenses.

The provisions of the statutes in the different states, as to the authorities in whom the power to grant liquor licenses shall be vested, exhibit a considerable difference of plan and policy. But speaking generally, this duty is confided either to the board of commissioners or supervisors of the county, to the county court, to the probate judge, to the council or board of aldermen of a city, or to a board of excise specially created for the purpose. There is no constitutional objection to conferring upon a city council the discretionary power to

¹⁹³ Comm. v. Auberton, 133 Mass. 404.

¹⁹⁴ Comm. v. Casey, 134 Mass. 194.

¹⁹⁵ Comm. v. Costello, 133 Mass. 192.

¹⁹⁶ Comm. v. Salmon, 136 Mass. 431.

¹⁹⁷ Comm. v. Ferden, 141 Mass. 28, 6 N. E. Rep. 239.

grant such licenses.¹⁹⁸ Nor is it beyond the power of the legislature to cast this duty upon the probate judge,¹⁹⁹ or, as was done by an early statute in South Carolina, the clerk of the general sessions of the peace.²⁰⁰ But the general rule is, that whatever court, person, or board is invested with this power by the statute, possesses it exclusively.²⁰¹ The law does not contemplate the exercise of such power co-ordinately by different persons or tribunals. And its exercise, by the proper authority, is in all the states restrained by conditions and limitations, some having reference to the character of the applicant or his obtaining the consent of a certain number of persons, and others depending upon local circumstances or local policy. Thus, where the statute limits the number of licenses to be granted by any city or town to one for every thousand of population, in determining whether a license thereafter granted is in excess of the provisions of the act, licenses lawfully granted for the current year, before the act took effect, and not otherwise forfeited or rendered void, must be counted.²⁰² So where the aldermen of a city, by a vote which has the effect of a standing rule, decide that no licenses shall be granted unless six aldermen assent thereto, this rule, while in force and acted upon, determines the effect of any vote upon granting a license, and if only five aldermen vote in favor of an applicant, a license is not granted.²⁰³ So, if a special law forbids the sale of liquor within two miles of the "S. Church" in M. county, this is descriptive of the locality, and no license can be granted within those limits, although the building intended for and known as the "S. Church" was not completed at the time the act was passed.²⁰⁴ But it is held that covenants in deeds, against the sale of intoxicating liquors on the premises conveyed, will not prevent the proper authorities from

¹⁹⁸ *State v. Columbia*, 17 S. Car. 80.

¹⁹⁹ *Intoxicating Liquor Cases*, 25 Kaus. 751, 37 Am. Rep. 284.

²⁰⁰ *O'Driscoll v. Viard*, 2 Bay, 316.

²⁰¹ See *Cooke v. Court of Common Pleas*, 51 N. J. Law, 85, 16 Atl. Rep. 176; *Zinner v. Comm.*, (Pa. Sup.) 14 Atl.

Rep. 431; *Wiggins v. Varner*, 67 Ga. 583.

²⁰² *Comm. v. Hayes*, 149 Mass. 32, 20 N. E. Rep. 456.

²⁰³ *Comm. v. Moran*, 148 Mass. 453, 19 N. E. Rep. 554.

²⁰⁴ *Jones v. Comm'rs of Moore Co.*, 106 N. Car. 436, 11 S. E. Rep. 514.

granting licenses which will have the effect to legalize such sales on such premises.²⁰⁵

§ 155. Power cannot be Delegated.

The power to grant liquor licenses, involving as it does the exercise of judgment and discretion, is such as must be exercised by the authority to which it is confided; it cannot lawfully be delegated to any other person or body. Thus, where the board of county commissioners is intrusted with this authority, it cannot confer upon the county attorney, either as such or as a simple agent, the power, nor impose upon him the duty, of issuing licenses or accepting bonds. And the county attorney cannot, in either capacity, be legally authorized to hear or determine upon an application for a license, or to fix or receive the price of the same, or to accept or approve the requisite bond, or to issue the license itself. And licenses issued by such county attorney are absolutely void, whether assumed to be issued by him as county attorney or as an agent for the board.²⁰⁶ Nor can the board of commissioners delegate to their clerk the power to issue licenses, and licenses granted by him, unless supported by a special order of the board, have no validity.²⁰⁷ So, if the charter of a city gives to the common council power to pass ordinances for the licensing of saloons, it is only the common council, and not the mayor, that can grant licenses.²⁰⁸ If, however, the matter in respect to which authority is delegated relates only to the mode of applying for the license, or to the clerical work of preparing and issuing the paper, but not to the power to grant it or to the discretion as to the persons to be licensed, it is not open to objection on this ground.²⁰⁹

§ 156. Application for License.

The first step in the proceedings to obtain a license, as commonly provided in the statutes, is the presentation to the proper authorities of

²⁰⁵ *State v. Busby*, 44 N. J. Law, 637.

²⁰⁶ *Hennepin Co. Comm'rs v. Robinson*, 16 Minn. 381, (Gil. 340.)

²⁰⁷ *Thorn v. Atlanta*, 77 Ga. 661; *Mayson v. Atlanta*, Id. 662.

²⁰⁸ *State v. Bayonne*, 44 N. J. Law, 114.

²⁰⁹ *In re Bickerstaff*, 70 Cal. 35, 11 Pac. Rep. 393.

a written application or petition on the part of the person who desires to be licensed. While this petition should contain all that the statute requires to appear in it, its substance is to be mainly regarded, and its form should not be judged by the strictest rules. Mere informalities in the petition are not sufficient ground for refusing to grant the license.²¹⁰ Under a statute which prohibits the sale without license of liquor in less quantities than a pint, a petition for license is not bad for failing to state in what quantity the applicant desires to sell.²¹¹ And a requirement that an application for a license shall be for the right to sell "liquors, wines, or beer" is sufficiently complied with by an application for a license to sell "spirituous or intoxicating liquors, wines, and beer."²¹² The petition should also contain a description of the premises where it is proposed to carry on the business; but this description is sufficient if so reasonably full and certain as to point out the exact location.²¹³ Thus, an application for license to sell liquor at "No. 1005 Elizabeth Avenue, the corner of Spring Street, in said city," sufficiently designates the place.²¹⁴ The petition should also show that the applicant has filed the affidavit required by the statute as a condition precedent to obtaining a license.²¹⁵ An alteration of a petition for a liquor license, which consists of erasing the name of the person to whom those recommending the application supposed the license was to issue, and substituting the name of another person, affords a sufficient ground for refusing a license to the substituted person.²¹⁶ The petition should bear the signature of the applicant. But in some circumstances and under the terms of some laws, this may be dispensed with, if it is indorsed with his verifying affidavit.²¹⁷

²¹⁰ *Hearn v. Brogan*, 64 Miss. 334, 1 South. Rep. 246.

²¹¹ *Hearn v. Brogan*, 64 Miss. 334, 1 South. Rep. 246.

²¹² *State v. Jefferson Co. Comm'rs*, 20 Fla. 425.

²¹³ *Murphy v. Monroe Co. Comm'rs*, 73 Ind. 483.

²¹⁴ *State v. Reingardt*, 46 N. J. Law, 337.

²¹⁵ *Glenn v. Lynn*, 89 Ala. 608, 7 South. Rep. 924.

²¹⁶ *Polk Co. Comm'rs v. Johnson*, 21 Fla. 578.

²¹⁷ *State v. Heege*, 37 Mo. App. 338.

§ 157. Affidavit of Applicant.

In some states, the applicant for a license is required to present, with his petition, an affidavit promissory in its nature, of his intention duly to observe all the provisions of the law. This, it is held, is a jurisdictional prerequisite to the issue of the license. And if the affidavit omits material statements which it should contain, the license, though issued by the proper officer, is void.²¹⁸ Sometimes, also, the affidavit is required to contain a statement that the signatures of the persons joining in the petition or recommending it are genuine, and were not procured by any fraud, bribery, or deception. These facts, it is said, the applicant should know of his own knowledge, and he should not base his affidavit on the statements of others whom he may have procured to get the names for him.²¹⁹

§ 158. Notice of Application.

It is generally provided, by statute or ordinance, that notice shall be given, in some public manner, of all applications for liquor licenses, for a prescribed period of time, in order that persons interested in contesting particular applications may be fully informed when and where to take action. This is held to be a prerequisite to the jurisdiction of the licensing authorities to pass upon the application, and until the expiration of the time during which the notice must be given, they have no power to take any action thereon.²²⁰ For example, where such notice was required to be published for two weeks, and the first publication, in a particular case, was made on June 5th, and the time for hearing the application was fixed in the notice on June 18th, and on that day, the licensing board being in session, the application was considered, and (there being objections to the issuing of the license) the 22d day of June was appointed for the hearing, it was held that the board had no authority to make the order of postponement, the notice being insufficient.²²¹ Where the provision of

²¹⁸ Russell v. State, 77 Ala. 89.

²¹⁹ State v. Sumter Co. Comm'rs, 22 Fla. 364.

²²⁰ Pelton v. Drummond, 21 Nebr. 492,

32 N. W. Rep. 593; State v. Murphy, 51

N. J. Law, 250, 17 Atl. Rep. 157.

²²¹ Pelton v. Drummond, 21 Nebr. 492,

32 N. W. Rep. 593. The notice is to be

the law is that the notice shall be published in the newspaper having the largest circulation in the county where the liquors are to be sold, in the absence of a charge of bad faith on the part of the applicant in the selection of the paper, his decision in that regard will not be inquired into.²²² These statutes further provide that the notice shall contain "a particular description of the premises on which the license is to be exercised, designating the building or part of a building to be used," or a statement of "the precise location of the premises in which he desires to sell." The decisions are that this requisite must be fully and exactly complied with. Any ambiguity in the description, or the use of terms which admit of a reasonable uncertainty as to what premises are intended, will invalidate the notice.²²³ A notice, for instance, giving nothing but the name of the applicant, and the name of the street and town, is not sufficient.²²⁴ It is also necessary to comply strictly with the provisions in regard to naming or describing the applicant. Thus, under a statute requiring notices of applications for license to "set forth the name of the applicant in full," a notice by a firm which designates the applicants as "J. F. Bearce & Son" is insufficient.²²⁵

§ 159. Recommendation of Application.

Another provision of the license laws, which exists in different forms in all the states adopting this system, is that which requires the applicant's petition to be indorsed, or accompanied, by a recommendation or petition signed by a certain number of qualified persons, or of his neighbors, or by a certain proportion of the voters, freeholders, or citizens resident within the district. This petition certifies to the moral fitness of the applicant for the privilege he seeks,

continued for two weeks. It is to be published in every issue of the paper. If the paper is published daily, then the notice must be published daily; if the paper is published weekly, then weekly publication will be sufficient. *State v. City of South Omaha, (Neb.)* 51 N. W. Rep. 291.

²²² *Lambert v. Stevens, (Nebr.)* 45 N. W. Rep. 457.

²²³ *Comm. v. Bearce*, 150 Mass. 389, 23 N. E. Rep. 99; *Barnard v. Graham*, 120 Ind. 135, 22 N. E. Rep. 112.

²²⁴ *Dexter v. Town Council, (R. I.)* 21 Atl. Rep. 347.

²²⁵ *Comm. v. Bearce*, 150 Mass. 389, 23 N. E. Rep. 99.

and perhaps, in some states, to other facts deemed essential or important, and expresses the desire of the signers that a license be issued to him. It must follow the statute and contain all that is there prescribed. Thus, if the law requires that the petition shall recommend the applicant as "of good reputation and a sober and suitable person to receive such license," a petition which omits the representation concerning good reputation is insufficient.²²⁶ Nor is a petition sufficient which avers that a certain firm is of good reputation, without further mention of the reputation of the individual members of the firm.²²⁷ The withdrawal of the name of a signer of such petition, after it has been presented to the licensing authorities, cannot, without their consent, divest them of jurisdiction.²²⁸ Although the statute may require that the petitioners shall each sign in the presence of two witnesses, it does not follow that the witnesses must subscribe or attest the signatures, unless that also is specified; and the failure to publish the mark of some of the petitioners, who made their mark in signing, and whose names are published, is not a material defect.²²⁹

§ 160. Who may Sign Recommendation.

The signers to a recommendation of a petition for license must be such as the statute requires,—adults, freeholders, tax-payers, residents of the district, citizens, or otherwise, according to the terms of the law. Any attempt to evade the law in this respect, or to practise a fraud upon it, will be discountenanced by the courts. Thus, a deed of lands, made to a large number of persons for a single consideration, and merely for the purpose of qualifying them to sign recommendations for licenses, is fraudulent, and will not constitute them "reputable freeholders" within the statute.²³⁰ But the signing of a recommendation for one species of liquor license does not disqualify the person from signing a recommendation for a license

²²⁶ Corbett v. Duncan, 63 Miss. 84; McCreary v. Rhodes, Id. 308.

²²⁷ Loeb v. Duncan, 63 Miss. 89.

²²⁸ State v. Reingardt, 46 N. J. Law,

²²⁹ State v. Sumter Co. Comm'rs, 22 Fla. 1.

²³⁰ State v. Atlantic City, 48 N. J. Law, 118, 8 Atl. Rep. 65.

of another kind.²³¹ The applicant for license, under some systems, is considered the same as any other registered voter of the district, if he possesses that qualification, and may himself sign the petition.²³² Where, as in Mississippi, it is provided that both petitions and counter-petitions may be filed, and that any name found on both petitions shall be counted against the granting of the license, it is held that this does not preclude one who has signed both a petition and a counter-petition from withdrawing his name from the counter-petition by signifying his desire therefor by still another written petition.²³³

§ 161. Number of Persons Recommending.

As to the number of signers necessary to a petition for the granting of a license to a particular applicant, the statutory provisions in the various states are widely different. In some, a certain number of persons are required,—as five, twelve, or twenty freeholders in his immediate neighborhood,—in others, a majority of the registered voters or tax-payers, or even a larger proportion. Whatever the requirement of the act may be, it must be fully complied with. Without the consent or indorsement of at least the minimum number of qualified persons, there is no jurisdiction to grant the license. A license issued without this sanction is void.²³⁴ And even if the applicant brings himself fully within the law, in this respect, still it is held, in most of the states, that the licensing authority is not thereby entirely divested of its discretion to reject the application for cause.²³⁵ Although it may appear on the face of the petition that the requisite number of persons have signed it, this does not preclude inquiry into the genuineness of the signatures; and if it be proved that so many of the signatures were forged or unauthorized as to reduce the number of genuine signatures below the required majority, it is proper to

²³¹ State v. Reingardt, 46 N. J. Law, 387.

²³² State v. Sumter Co. Comm'rs, 22 Fla. 1.

²³³ Perkins v. Henderson, (Miss.) 9 South. Rep. 897.

²³⁴ Metcalf v. State, 76 Ga. 308; *Ex parte Cox*, 19 Ark. 688.

²³⁵ Perkins v. Ledbetter, (Miss.) 8 South. Rep. 507.

refuse the license.²³⁶ The statutes prescribing this condition may be said to have generally in view the interests of the people who live nearest to the locality where the privilege, if granted, is to be exercised, and they should be construed with reference to that object. Thus, in Georgia, the law requires the written consent of the nearest *bona fide* residents, five of whom shall be freeholders owning land (irrespective of county lines) nearest the place of business to be licensed, with a proviso that the act shall not apply to incorporated towns or cities. And it is held that the persons residing nearest the place where the liquor is to be sold are the persons who are to give their consent, and it makes no difference whether they reside in a different county from that of the applicant or not, or within an incorporated town or city.²³⁷ In Missouri, where the requirement for the larger towns is that the petition shall be signed by a majority of the "assessed tax-paying citizens," it is held that the court, in determining whether sufficient names appear, must count married or single women who reside in the town or city, and own property in their own right, and were assessed thereon at the last assessment, and also minors, resident in the city, who have guardians and who own property, but that persons residing outside the city, though owning property in the city and regularly assessed, are not to be counted.²³⁸ It seems that there is no objection to uniting the signatures on several papers, recommending the same applicant, if such papers are exact duplicates. But in a case where the applicant circulated several petitions among the voters, the captions to which were materially different, it was held that he could not take the names subscribed to the various petitions and attach them all to one, in order to make up a majority in favor of the license.²³⁹ Where the petition, at the time of its presentation, does not bear enough signatures to warrant the issuing of a license, but afterwards receives additional names, this

²³⁶ State v. County Comm'rs, 22 Fla. 364.

²³⁷ Ballew v. State, 84 Ga. 138, 10 S. E. Rep. 623. And see Glenn v. Lynn, 89 Ala. 608, 7 South. Rep. 924.

²³⁸ State v. County Court, 90 Mo. 593, 2 S. W. Rep. 788. See, also, State v.

Meyers, 80 Mo. 601. The petition must be signed by a majority of "assessed tax-paying citizens," not merely of taxpayers. State v. Heege, 37 Mo. App. 338.

²³⁹ Collins v. Barrier, 64 Miss. 21, 8 South. Rep. 164.

proceeding, although irregular, will not nullify the petition; for proceedings to obtain a license need not be conducted with the same strict accuracy which is required in purely judicial proceedings.²⁴⁰ Finally, it is to be remarked that a statute requiring an applicant for license to secure the recommendation of a majority of the householders in the precinct is not inoperative because it provides no way of obtaining such recommendation.²⁴¹

§ 162. Moral Qualifications of Applicant.

In all the states where a principle of selection is applied to the persons seeking the privilege of a license to sell liquor, the laws require that the applicant shall be possessed of certain moral qualifications, as that he shall be a "moral and temperate man" or a "sober and suitable person to be licensed." The question, however, under these statutes, while concerning in a sense the general moral character of the petitioner, is one which must necessarily be determined by an examination of his conduct in particular instances. Specific acts of immorality may be adduced to show his unfitness, and the licensing authorities are to judge whether the acts shown are sufficient, in themselves or as an index to character, to disqualify him.²⁴² Unless otherwise provided by statute, there is no absolute and single criterion. For example, one may be an immoral man, and not a proper person to be licensed, although he himself is not in the habit of becoming intoxicated.²⁴³ And on the other hand, the fact that he has been seen intoxicated, and that he sometimes takes a drink, is not necessarily enough to disqualify him.²⁴⁴ If it is shown that the applicant is a common gambler, or is in the habit of frequenting gambling houses, this is thought to be sufficient ground for withholding the license, although such conduct is not specified in the statute as a disqualifying cause.²⁴⁵ But when one of two joint petitioners for a license absconds, this is not necessarily a reason for

²⁴⁰ State v. Jefferson Co. Comm'rs, 20 Fla. 425; Livingston v. Corey, (Nebr.) 50 N. W. Rep. 263.

²⁴¹ Jones v. Hilliard, 69 Ala. 300.

²⁴² Stockwell v. Brant, 97 Ind. 474.

²⁴³ Hill v. Perry, 82 Ind. 28.

²⁴⁴ Calder v. Sheppard, 61 Ind. 219.

²⁴⁵ Groseap v. Rainier, 111 Ind. 361, 12 N. E. Rep. 694.

refusing the license to the other.²⁴⁶ It is held, where the statute is expressed in general terms, that a single violation of the liquor laws, previously committed by the applicant, is not alone sufficient to disqualify him. Such an act is indeed evidence bearing upon his character, but it is not conclusive proof of his unfitness to hold the privilege.²⁴⁷ But *repeated* violations of the law—as, a succession of unlicensed sales, or numerous instances of illegal sales under a former license—will be sufficient to warrant the refusal of the license.²⁴⁸ So where it was shown that the applicant had been previously engaged in the liquor traffic, and had, while so engaged, sold to habitual drunkards, and did not keep an orderly house, and that he was incapable of keeping such a house, and was not a fit person to be intrusted with the sale of liquor, it was held proper to refuse him a license.²⁴⁹ In some of the states, however, the case of a single previous violation of the law is provided for by statute. In Nebraska, for instance, the board must refuse a license “if it shall be satisfactorily proven that the applicant for license has been guilty of the violation of any of the provisions of this act within the space of one year, or if any former license shall have been revoked for any misdemeanor against the laws of this state.” Under this statute, it is held that when an applicant has violated the act by selling liquor to an habitual drunkard, it is the duty of the board to refuse a license.²⁵⁰ But it is also held that the terms of this statute are not exclusive; they do not limit the licensing board to the consideration of the objections named.²⁵¹ When a remonstrance against the issuing of a license, based on objections to the moral character of the applicant, is filed, and the question thus brought into issue, the burden is cast upon the petitioner of proving, by a preponderance of evidence, that he is not disqualified from obtaining the license by immorality or previous illegal conduct and is not unfit to receive and exercise the privilege.²⁵²

²⁴⁶ Polk Co. Comm’rs v. Johnson, 21 Fla. 578.

²⁴⁷ Golden v. Bingham, 61 Ind. 198; Keiser v. Lines, 57 Ind. 431.

²⁴⁸ Bourjohn’s Application, 2 Pa. Co. Ct. Rep. 33; Meitzler’s Application, Id. 37.

²⁴⁹ Brunson v. Dunn, 124 Ind. 252, 24 N. E. Rep. 749.

²⁵⁰ State v. Koso, 25 Nebr. 607, 41 N. W. Rep. 558.

²⁵¹ State v. Hanlan, 24 Nebr. 608, 39 N. W. Rep. 780.

²⁵² Goodwin v. Smith, 72 Ind. 113, 37

This rule is derived from the principle that "whoever asserts a right dependent for its existence upon a negative, must establish the truth of that negative."

§ 163. Requirement as to Residence.

The requirement that the applicant for license shall be a citizen of the state, or a resident of the county or other district where he proposes to do business, is jurisdictional in its nature. Unless it be made to appear to the licensing authorities that the petitioner possesses this qualification, they have no power to grant the license.²⁵³ In a case in New York, it appeared that a license had been granted by the excise commissioners of Seneca county to one D., reciting that he was a resident of R. in said county, and authorizing him to sell liquor to be drunk in his house as an inn or tavern. In point of fact, D. at the time resided in the town of T., in Yates county. Under this license, he kept a drinking place in a mere recess in a room in his warehouse, situated in the waters of the Seneca lake, a few feet from its western shore, and a few yards from the county line, within the town of R. On this state of facts, it was held that D.'s license was void.²⁵⁴

§ 164. Remonstrances.

The license laws generally provide for the filing of remonstrances or counter-petitions by persons desiring to oppose the grant of a license to a particular applicant. This right, however, is usually restricted to parties who may have a practical interest in the matter. Thus, in one state, the privilege of remonstrating is given to "any voter of the township," and it is held that the right to remonstrate is lost when the person ceases to be a voter of the township.²⁵⁵ The remonstrance must be presented to the board or court empowered to grant licenses, before which the particular application is pending; on appeal, the court has no power to allow a new party to appear

Am. Rep. 144; *Chandler v. Ruebelt*, 83 Ind. 139.

²⁵³ *McGee v. Beall*, 63 Miss. 455.

²⁵⁴ *People v. Davis*, 45 Barb. 494.

²⁵⁵ *List v. Padgett*, 96 Ind. 126.

and file a remonstrance.²⁵⁶ As to the time of filing these objections, under a statutory provision that the petition for license shall lie over for a month "for consideration and the reception of counter-petitions," it is held that a counter-petition may be presented after the month, if before the license has actually been granted.²⁵⁷ As a rule, the remonstrance should be directed to the application of some particular person. But where it requests that the license shall not be granted to either of two named persons, nor to any other, it is considered to be both general and particular, and it should not be rejected on the mere ground of its generality in one aspect.²⁵⁸ And in Indiana, under an early statute which provided that no license should be granted if a majority of the freeholders should remonstrate against it, it was held that a general remonstrance against granting license to any person was within the spirit of the statute, and the commissioners, on receiving it, should refuse all licenses.²⁵⁹ But this is a method of establishing local option by indirection, and probably would not now be countenanced. The grounds of remonstrance are the statutory disqualification of the applicant, the insufficiency of the petition or notice, or any other matters which may lawfully influence the discretion of the authorities in considering the application. Its allegations should be specific. For example, a remonstrance on the ground of the applicant's immorality, or of his unfitness otherwise to be intrusted with the privilege, should set forth the particulars of such immorality or unfitness with such reasonable certainty as will advise him of the nature of the charge against him.²⁶⁰ Further than this the courts do not appear to have much considered the formal requisites of the remonstrance, and probably it should not be judged by the most strict and technical rules. Under the laws of Pennsylvania, a remonstrance must be verified by an affidavit, otherwise it will not be considered.²⁶¹

²⁵⁶ *Miller v. Wade*, 58 Ind. 91.

²⁵⁷ *Rogers v. Hahn*, 63 Miss. 578.

²⁵⁸ *Collins v. Barrier*, 64 Miss. 21, 8 South. Rep. 164.

²⁵⁹ *Woods v. Pratt*, 5 Blackf. 377.

²⁶⁰ *Grummon v. Holmes*, 76 Ind. 585.

²⁶¹ *In re Palmer's License*, 3 Pa. Co. Ct. Rep. 314.

§ 165. Right to Contest Application.

As a rule, any one who desires to resist the granting of a license must follow the course prescribed by the statute; he must file a proper remonstrance before the proper authorities, and take the other required steps, else he cannot be heard; and an unnamed party cannot be permitted to appear by attorney and resist the application.²⁶² In Iowa, any citizen may appear and show cause why the permit should not be granted, and may maintain *certiorari*, whether he has any property or interests to be affected or not.²⁶³ It is also held, in Indiana, that where the board of licensing commissioners has voluntarily appeared in the circuit court, on appeal, and contested the application, such board, though ordinarily not a proper party on such appeal, will not be heard to move for its dismissal on that ground in the supreme court.²⁶⁴

§ 166. Appointing Day for Hearing.

Where, as by the Nebraska statute, it is required that, on remonstrance against the issuing of a liquor license, a day for a hearing shall be appointed, the licensing board is bound to grant a hearing and to fix a day for the same in the future. The statute is mandatory, and refusal to follow its provisions will be remedied by *mandamus*. And a license issued without appointing a time for hearing a remonstrance filed, and investigating the same, will be cancelled.²⁶⁵ The board must also grant to the remonstrants a reasonable time to produce their testimony.²⁶⁶ And in one case, where the board, at ten o'clock at night, appointed nine o'clock the next morning as the hour for the hearing, it was held that this was unreasonable, and amounted to a substantial denial of a hearing to the remonstrants.²⁶⁷ Further,

²⁶² *Ex parte* Miller, 98 Ind. 451.

²⁶³ *Darling v. Boesch*, 67 Iowa, 702, 25 N. W. Rep. 887.

²⁶⁴ *Murphy v. Monroe Co. Comm'rs*, 73 Ind. 483.

²⁶⁵ *State v. Reynolds*, 18 Nebr. 431, 25 N. W. Rep. 610; *State v. Hanlan*, 24

Nebr. 608, 39 N. W. Rep. 780; *Vanderlip v. Derby*, 19 Nebr. 165, 26 N. W. Rep. 707.

²⁶⁶ *Clark v. State*, 24 Nebr. 263, 38 N. W. Rep. 752.

²⁶⁷ *State v. Weber*, 20 Nebr. 467, 30 N. W. Rep. 531.

if the licensing board refuses to receive testimony in support of the remonstrance, the district court will remand the cause, in order that such testimony may be taken, and a decision rendered thereon.²⁶⁸

§ 167. Procedure on Hearing Application.

Whatever provisions of the law are applicable to the proceedings on an application for a liquor license must be duly observed, and with more especial strictness where the power and duty to grant such licenses is vested in a court. If, as is the case in some states, the hearing on such applications is required to be had at certain terms of the court, a hearing at any other time, or out of court, will not justify the grant of a license.²⁶⁹ If a remonstrance against the granting of the license has been filed, it is the duty of the court or licensing board to afford the parties a full opportunity to be heard. They cannot proceed to issue the license without investigating the charges preferred by the remonstrants. And if they refuse to hear testimony, and at once take decisive action in the matter, *mandamus* will lie to compel them to receive and consider the evidence offered.²⁷⁰

§ 168. Evidence on Application.

We have already seen that the burden is on the applicant for license to prove, by a preponderance of evidence, that he is not disqualified for the privilege he seeks by immorality, non-residence, or other unfitness.²⁷¹ It is also held that when the petitioner's moral character is in issue, the court may require him to appear before them in person, and, on his failing to appear except by attorney, may dismiss his application.²⁷² It is also proper to hear evidence of matters which would render the grant of the particular license inexpedient. Thus, where the applicant is required to state the precise location of the premises, evidence showing the proximity of a school

²⁶⁸ *Steinkraus v. Hurlbert*, 20 Nebr. 519, 30 N. W. Rep. 940.

²⁶⁹ *State v. Kennedy*, 1 Ala. 31.

²⁷⁰ *Steinkraus v. Hurlbert*, 20 Nebr. 519, 30 N. W. Rep. 940; *State v. Mat-*

thews, 51 N. J. Law, 253, 17 Atl. Rep. 154; *Dufford v. Nolan*, 46 N. J. Law, 87.

²⁷¹ *Supra*, § 162.

²⁷² *In re Wheelin*, 134 Pa. St. 554, 19 Atl. Rep. 755.

or college is admissible.²⁷³ Objections may also be taken to the regularity or sufficiency of the prior proceedings. But such objections, unless apparent on the face of the record, must be supported by affirmative evidence on the part of those contesting the application. For instance, the allegations of a remonstrance, that certain signatures to the petition were unduly obtained, are not evidence of that fact.²⁷⁴ Yet the truth of an averment in a pleading of the applicant that he was recommended by five respectable freeholders in his immediate vicinity, is not admitted by a demurrer thereto, not being well pleaded.²⁷⁵ We must, however, be careful to distinguish between preliminary matters which are essential to the jurisdiction and such as are not. To illustrate this principle,—the statute in New Jersey makes it essential to the jurisdiction of the court that twelve reputable freeholders shall certify to the applicant's reputation for honesty and temperance, and his possession of the accommodations required by the act. But the jurisdiction is not dependent upon the *truth* of this certificate. And hence, on the hearing of the application, it is not error to exclude evidence to show that the certifying freeholders had no sufficient knowledge of the facts.²⁷⁶

§ 169. Disqualification of Judges.

Where a member of the licensing board signs a petition for a license to sell intoxicating liquors, as a resident freeholder of the ward in which the license is to be granted, such member will be thereby disqualified from voting on the question of granting or refusing the license, and if, without his vote, the board is equally divided, no valid license can issue.²⁷⁷ It is said, however, that a member of a board of supervisors who canvasses for or signs a petition for an election under the local option law, is not thereby disqualified from acting on such petition in his official capacity, in pursuance of the

²⁷³ *Eslinger v. East*, 100 Ind. 434.

²⁷⁴ *In re McCullough*, 51 Ark. 159, 10 S. W. Rep. 259.

²⁷⁵ *Devin v. Belt*, 70 Md. 352, 17 Atl. Rep. 375.

²⁷⁶ *State v. Hill*, 52 N. J. Law. 326, 19 Atl. Rep. 789.

²⁷⁷ *Foster v. Frost*, 25 Nebr. 731, 41 N. W. Rep. 647; *State v. Koso*, 25 Nebr. 607, 41 N. W. Rep. 558.

terms of the law; the interest which disqualifies a judge is pecuniary, not political.²⁷³

§ 170. Discretion in Granting or Refusing License.

The rule obtains in a few of the states that if a person who desires a liquor license brings himself within the terms of the law, by complying with all the statutory preliminaries, and possessing the requisite moral and other qualifications, he is entitled as a matter of law to be licensed, and the license cannot be withheld from him.²⁷⁹ But in far the greater number of states, the doctrine is now well settled that the court or board charged with the duty of issuing licenses is invested with a sound judicial discretion, to be exercised in view of all the facts and circumstances of each particular case, as to granting or refusing the license applied for.²⁸⁰ The principle is, that the licensing authorities act judicially, and not merely in a ministerial capacity.²⁸¹ In determining the nature, as well as the existence, of this discretion, much will depend upon the language of the local statute, and this, of course, should be carefully scrutinized. But the general disposition, under all the diverse forms of statutory provisions, is to leave a wide margin of discretion to the court or board hearing the application. This disposition is manifested, in some states, in the construction placed upon the provision that the authorities "may grant" licenses to certain persons. This, it is held, clearly

²⁷³ *Lemon v. Peyton*, 64 Miss. 161, 8 South. Rep. 235.

²⁷⁹ *Miller v. Wade*, 58 Ind. 91; *Zanone v. Mound City*, 11 Ill. App. 334; *State v. Justices of Inferior Court*, 15 Ga. 408; *McLeod v. Scott*, (Oreg.) 26 Pac. Rep. 1061.

²⁸⁰ *Batters v. Dunning*, 49 Conn. 479; *Ex parte Persons*, 1 Hill, (N. Y.) 655; *In re Petition of Conway*, (Pa. Sup.) 1 Atl. Rep. 727; *Toole's Appeal*, 90 Pa. St. 376; *Leister's Appeal*, (Pa. Sup.) 11 Atl. Rep. 387; *French v. Noel*, 22 Gratt. 454; *Ailstock v. Page*, 77 Va. 386; *Ex parte Yeager*, 11 Gratt. 655; *Hein v. Smith*, 13

W. Va. 358; *Attorney-General v. Justices of Guilford*, 5 Ired. 315; *Muller v. Buncombe Co. Comm'rs*, 89 N. Car. 171; *Nepp v. Comm.*, 2 Duval, 546; *Pierce v. Comm.*, 10 Bush, 6; *Ex parte Whittington*, 34 Ark. 394; *Ex parte Levy*, 43 Ark. 42, 51 Am. Rep. 550; *State v. Board of Comm'rs*, 45 Ind. 501; *State v. Holt County Court*, 39 Mo. 521; *State v. Cass Co. Comm'rs*, 12 Nebr. 54, 10 N. W. Rep. 571; *Perry v. Salt Lake City*, (Utah,) 25 Pac. Rep. 739; *United States v. Comm'rs of D. C.*, 6 Mackey, 409.

²⁸¹ *State v. Board of Comm'rs*, 45 Ind. 501.

invests them with discretion in the matter.²⁸² "The authorities are uniformly to the effect that the word ['may'] is only to be construed as mandatory for the purpose of sustaining or enforcing a right, but never to create one."²⁸³ Indeed, some of the cases go even much further than this. Under the North Carolina code, providing that the commissioners "shall grant" a license "to all properly qualified applicants," it is held that they may consider whether the demands of the public require an increase of such accommodations, and whether the place where it is proposed to establish a retail shop is a suitable one, and that, in the exercise of a sound discretion, they may refuse a license even to an applicant properly qualified.²⁸⁴ On the same principle, it is ruled that where authority is given to license suitable persons "upon the recommendation of the selectmen of the town," it is not obligatory to license all persons so recommended.²⁸⁵ So where the petition for license is required to be signed by a majority of the voters of the town, the fact that it is so signed does not compel the authorities to grant the license, but they may still, in their discretion, refuse it in any instance.²⁸⁶ And although a majority of the voters in a district, at a local option election, have voted "for license," this does not mean that the court must act favorably upon all applications for license.²⁸⁷

In Pennsylvania—where this question has received more frequent and careful attention than in any other state—it is considered that the relative weight of the petition for license and of the remonstrances against it, as evidenced by the number and character of the names signed to each, is a proper matter to influence the decision of the court. In a case where but fourteen people signed the petition, and more than two hundred signed a remonstrance against it, and the applicant had been refused a license the year before for a violation of the liquor laws, it was held proper to refuse a license.²⁸⁸ And although the fact that the number of remonstrants exceeds the

²⁸² *Ailstock v. Page*, 77 Va. 386.

²⁸³ *State v. Holt County Court*, 39 Mo. 521.

²⁸⁴ *Muller v. Buncombe Co. Comm'rs*, 89 N. Car. 171.

²⁸⁵ *Batters v. Dunning*, 49 Conn. 479.

²⁸⁶ *Perkins v. Ledbetter*, (Miss.) 8 South. Rep. 507.

²⁸⁷ *Ex parte Whittington*, 34 Ark. 394.

²⁸⁸ *Leister's Appeal*, (Pa. Sup.) 11 Atl. Rep. 387.

number of petitioners is not *per se* conclusive on the court that the license is not a matter of public necessity, yet its decision against granting the license, based on such remonstrances, is a proper exercise of its discretion.²⁸⁹ And after refusing the license, the court will not be required by *mandamus* to pass on the question of public necessity, on the ground that its refusal was based wholly on public sentiment, as evidenced by the comparative number of petitioners and remonstrants.²⁹⁰ Under the laws of that state, the court is to consider whether the license sought is "necessary for the accommodation of the public and entertainment of strangers and travelers." And hence it is held that, even though no objection or remonstrance whatever be presented, still the issue of the license is not a matter of right, but rests in the judicial discretion of the court.²⁹¹

The discretion of the licensing authorities, however, is exercised once for all, and the decision cannot be recalled when once finally given. For example, where a formal license was issued to the peti-

²⁸⁹ *In re Sparrow*, 138 Pa. St. 116, 20 Atl. Rep. 711.

²⁹⁰ *In re King*, 23 W. N. C. 152, 16 Atl. Rep. 487.

²⁹¹ *In re Raudenbusch*, 120 Pa. St. 328, 14 Atl. Rep. 148. In this case the court observed: "The petitioner begs the whole case when he assumes that he has a right to a license because he is a respectable man, has always kept a respectable house, and that no remonstrances have been filed against him. It is an error to suppose that the sole duty of the court is confined to the inquiry whether the applicant is a citizen of the United States and a man of good moral character. Back of all this lies the question whether the petitioner's house is 'necessary for the accommodation of the public and entertainment of strangers and travelers,' and the plain duty of the court of quarter sessions, under the act of assembly, is to so exercise its discretion as to 'restrain' rather than increase the sale of liquor. . . . It may thus happen that licenses are refused to persons against whom there is

no possible objection on personal grounds. Thus, if a ward has one hundred public houses, where only fifty are required by the public wants, it is plain that fifty houses must be denied licenses, although every one of the applicants is a worthy man, and keeps a respectable house, and though there be neither remonstrances nor objection on the score of want of fitness. The denial of a license, under such circumstances, may seem arbitrary. The trouble is, there are more persons who want to sell liquor than the legislature consider it for the public good to license for that purpose."

It is important here to observe that the decisions in *In re Pollard*, 127 Pa. St. 507, 17 Atl. Rep. 1087, and *In re Prospect Brewing Co.*, 127 Pa. St. 523, 17 Atl. Rep. 1090,—that the discretion of the trial court is limited to an inquiry into the three qualifications mentioned in the act, and where no objection on either of those grounds appears, the court must grant the license,—were governed by local statutes in force in

tioner, but, through the omission of the authorities to take certain steps required by the general license law, the license was invalid, and subsequently the required steps were taken, whereupon the party applied for a new license on the credit of his former payment of the fee, and for the unexpired term for which he had paid, it was held that he was of right entitled to it.²⁹²

§ 171. Nature of This Discretion.

The discretion to be exercised in granting or refusing licenses is a sound judicial discretion, to be determined, in its exercise, by the facts and circumstances of each case. It is not the arbitrary will of the judge; it must rest on reasons. It would be improper to grant a license to any applicant without investigating his qualifications. And it would be equally improper to refuse a license to any applicant from mere prejudice or caprice, or without any reason whatever.²⁹³ The limits of the discretion are marked out by the law, and to exceed them, on one side or the other, is an abuse of power. If the licensing authorities are not bound to grant a license to every one who proves himself of good moral character, neither, on the other hand, have they the arbitrary power to refuse, at their will, *all* applicants for license.²⁹⁴ The true doctrine on this point is stated by the supreme court of Pennsylvania, in saying that the discretion is a sound legal discretion, resting on the circumstances of each case, and not on a general opinion as to the propriety or impropriety of granting licenses. Whether licenses should be granted at all or not, is for the determination of the legislature, not for the courts. And therefore the court should neither grant a license to any one who brings himself within the law, without regard to other circumstances of fitness, nor determine to refuse all applications. But it is its duty to

Allegheny county and Philadelphia respectively. And it is well settled doctrine that, in localities not governed by special statutes, the court may refuse a wholesale liquor license to a distiller when, in its judgment, it would be injurious to the public welfare. Comm.

v. Wilson, 25 W. N. C. 148, 18 Atl. Rep. 601.

²⁹² *State v. Cornwell*, 12 Nebr. 470, 11 N. W. Rep. 729.

²⁹³ *Ex parte Levy*, 43 Ark. 42, 51 Am. Rep. 550.

²⁹⁴ *Attorney General v. Justices of Guilford*, 5 Ired. 315.

hear and determine each case, to ascertain the fitness of the applicant, the necessity for his house for public accommodation, and that he has fully complied with the law.²⁹⁵ As was said in another case: "The law of the land has decided that licenses shall be granted to some extent, and has imposed the duty upon the court of ascertaining the instances in which the license shall be granted. In order to perform this duty properly, the act of assembly has provided means by which the conscience of the court may be informed as to the facts. It may hear petitions, remonstrances, or witnesses; and we have no doubt the court may in some instances act of its own knowledge. The mere appearance of an applicant for license, when he comes to the bar of the court, may be sufficient to satisfy the judge that he is not a fit person to keep a public house. The judge is not bound to grant a license to a man whom he knows to be drunkard or a thief, or has actual knowledge that his house is not necessary for the public accommodation. The object of evidence in such cases is to inform the conscience of the court, so that it can act intelligently and justly in the performance of a public duty. While the act of deciding in such cases is, perhaps, *quasi* judicial, the difference between the granting or withholding of a license and the decision of a question between parties to a private litigation is manifest."²⁹⁶

§ 172. Mandamus to Compel Issuing of License.

The rule is well settled that where a court or board of officers is invested with a judicial discretion as to the grant or refusal of licenses, and where, in the exercise of such discretion, it has examined and rejected a particular application for license, *mandamus* will not lie to review the case and compel the grant of a license, unless it shall appear that such discretion has been abused or exercised in an arbitrary and unlawful manner.²⁹⁷ But if a license has been refused to

²⁹⁵ *Schlaudecker v. Marshall*, 72 Pa. St. 200.

²⁹⁶ *In re Raudenbusch*, 120 Pa. St. 328, 14 Atl. Rep. 148.

²⁹⁷ *Batters v. Dunning*, 49 Conn. 479; *In re Collarn*, 134 Pa. St. 551, 19 Atl.

Rep. 755; *Schlaudecker v. Marshall*, 72 Pa. St. 200; *In re Knarr*, 127 Pa. St. 554, 18 Atl. Rep. 639; *Devin v. Belt*, 70 Md. 352, 17 Atl. Rep. 375; *Jones v. Moore Co. Comm'rs*, 106 N. Car. 436, 11 S. E. Rep. 514; *Comm'rs of Maxton v. Com-*

a properly qualified person, without any reason whatever, or without any reason which is valid and sufficient in law, but in the arbitrary or capricious exercise of the power vested in the licensing authorities, then redress may be had by the process of *mandamus*.²⁹⁸ Thus, if the licensing authority based its refusal on disqualifications not authorized by law to be considered, or on objections to the moral character of the applicant, when the applicant was a corporation and therefore could have no character, a peremptory *mandamus* will be granted to compel the issue of a license.²⁹⁹ So, in Missouri, this is the proper remedy to compel the issuing of a dram-shop license by the proper officer, when the only discretion of such officer in the matter is as to the sufficiency of the surety.³⁰⁰ In New York, it is provided by statute that the action of the excise commissioners may be reviewed by writ of *mandamus*, and that if the court shall decide, upon the hearing of the *mandamus*, that the license has been arbitrarily refused or rejected without good or valid reasons, the court may direct the issuance of the license.³⁰¹ In Massachusetts, it is held that the mayor of a city is not obliged to sign a license to sell intoxicating liquors, or a common victualler's license, granted by the board of aldermen, where the mayor is not satisfied that the petitioner for such license has complied with all the provisions of the law so as to entitle him to the license, and the mayor cannot be controlled by means of this writ.³⁰² Further, as premature applications to the courts are not favored, and writs of this character will not be granted until the necessity for their use arises, it is held that *mandamus* will not lie to compel municipal officers to issue a liquor license to an applicant whose existing license

m'rs of Robeson, 107 N. Car. 335, 12 S. E. Rep. 92; Dunbar v. Frazer, 78 Ala. 538; Ramagnano v. Crook, 85 Ala. 226, 3 South. Rep. 845; Heblich v. Judge of Hancock Co. Ct., (Ky.) 10 S. W. Rep. 465; Stanley v. Monnet, 34 Kans. 708, 9 Pac. Rep. 755; State v. Bonnell, 119 Ind. 494, 21 N. E. Rep. 1101; Crotty v. People, 3 Ill. App. 465; State v. Hudson, 13 Mo. App. 61; State v. Pearse, (Nebr.) 48 N. W. Rep. 391; State v. Cass Co. Comm'rs, 12 Nebr. 54, 10 N. W. Rep. 571.

²⁹⁸ Zanone v. Mound City, 103 Ill. 552; *In re Sparrow*, (Pa. Sup.) 20 Atl. Rep. 692.

²⁹⁹ *In re Prospect Brewing Co.*, 127 Pa. St. 523, 17 Atl. Rep. 1090.

³⁰⁰ *State v. Ruark*, 34 Mo. App. 325; *Bean v. County Court*, 33 Mo. App. 635.

³⁰¹ *People v. Andrews*, 54 N. Y. Super. Ct. 183.

³⁰² *Deehan v. Johnson*, 141 Mass. 23, 6 N. E. Rep. 240.

has more than three months yet to run.³⁰³ Where, after an application for a writ of *mandamus* to compel a county court to issue a license to relator to keep a saloon, it appeared that indictments had been found against relator for selling liquor to minors and allowing gambling in his saloon, it was held that it would be an unwise exercise of the power of the court to issue the writ until the indictments were disposed of favorably to the relator.³⁰⁴ Where this remedy is open to a party, he must pursue it, and he is not justified in selling without a license because his application for a license was arbitrarily refused.³⁰⁵

§ 173. Appeal from Order of Licensing Authority.

In some of the states, the rule has obtained that the decision of the court or board empowered to grant licenses is final and conclusive, so that, if no error appears on the record, and it is not shown that there was an abuse of its discretion, no appeal can be taken from its determination.³⁰⁶ In Pennsylvania, it is said that an appeal from the refusal of a court of quarter sessions to grant a license is a substitute for a *certiorari*, and brings up nothing but the record showing the petition and refusal, and, as the reasons for the refusal form no part thereof, the appeal will be dismissed.³⁰⁷ It seems that it might be otherwise if the reasons were set forth in the record. But still the discretion of the lower court would not be interfered with, unless manifestly abused. And if the record shows that the license was refused because the applicant did not possess the qualifications required by law, it will not be disturbed on appeal.³⁰⁸ But in several states, an appeal from the decision of the licensing authorities is provided by statute, or is recognized as proper under the general laws regulating the appellate jurisdiction of the courts.³⁰⁹ And where

³⁰³ *State v. Bonnell*, 119 Ind. 494, 21 N. E. Rep. 1101.

³⁰⁴ *State v. Weeks*, 93 Mo. 499, 6 S. W. Rep. 266.

³⁰⁵ *Brock v. State*, 65 Ga. 437.

³⁰⁶ *French v. Noel*, 22 Gratt. 454; *Toole's Appeal*, 90 Pa. St. 376.

³⁰⁷ *In re Berg*, (Pa. Sup.) 21 Atl. Rep.

77; *Leister's Appeal*, (Pa. Sup.) 11 Atl. Rep. 887.

³⁰⁸ *In re Goldman*, 138 Pa. St. 321, 22 Atl. Rep. 23.

³⁰⁹ *Ex parte Dunn*, 14 Ind. 122; *State v. Board of Comm'rs*, 45 Ind. 501; *Groscap v. Rainier*, 111 Ind. 361, 12 N. E. Rep. 694; *Ex parte Lester*, 77 Va. 663;

an appeal is given to the unsuccessful applicant, it is also held that the persons who signed a remonstrance or counter-petition may, if the license is granted, appeal from the order.³¹⁰ And where the remonstrants bring a writ of review, the county or other public corporation granting the license must be made a party.³¹¹ If the statute which authorizes the taking of an appeal from a decision on an application for license omits to make special provision as to the manner in which the appeal shall be taken and perfected, it must conform, in these respects, to the provisions of the general law; as for instance, in regard to the bond required to be given.³¹² Where the licensing board grants a license against a remonstrance filed, and an appeal is taken, it must recall such license, if issued, until the appeal is decided by the court *ad quem*.³¹³ But if the action of the board is affirmed by that court, a *mandamus* will not issue to compel the cancellation of the license until an appeal to the supreme court is determined.³¹⁴ And a license issued after a reasonable time has elapsed to take an appeal from an order overruling a remonstrance to the granting thereof, but before such an appeal is actually taken, is valid, notwithstanding a notice of intention to appeal.³¹⁵ As to the matters proper to be considered on the appeal, the law varies in the different states. In Virginia, an appeal from the county court, to which the application for license must first be made, to the circuit court, is considered an application *de novo* to the latter court.³¹⁶ In Nebraska, it is said that the appeal is not a proceeding in error, but requires a decision on the merits.³¹⁷ In Indiana, nothing can be tried on the appeal except what appears to have been in issue before the licensing board; and where both the board and the circuit court act upon a remonstrance, the applicant cannot for the first time successfully urge in the supreme

Lester v. Price, 83 Va. 648, 3 S. E. Rep. 529; Lydick v. Korner, 13 Nebr. 10, 12 N. W. Rep. 838.

³¹⁰ Collins v. Barrier, 64 Miss. 21, 8 South. Rep. 164. Compare Drapert v. State, 14 Ind. 123.

³¹¹ Wood v. Riddle, 14 Oreg. 254, 12 Pac. Rep. 385.

³¹² Blair v. Kilpatrick, 40 Ind. 312.

³¹³ State v. Bonsfield, 24 Nebr. 517, 39 N. W. Rep. 427.

³¹⁴ State v. Barton, 27 Nebr. 476, 43 N. W. Rep. 249.

³¹⁵ Lydick v. Korner, 13 Nebr. 10, 12 N. W. Rep. 838.

³¹⁶ Lester v. Price, 83 Va. 648, 3 S. E. Rep. 529.

³¹⁷ State v. Bonsfield, 24 Nebr. 517, 39 N. W. Rep. 427.

court that no evidence was given of the legal qualification of the remonstrants.³¹⁸ In Kentucky, if the evidence on appeal fails to show that there is a necessity for the grant of the license, or that travelers will be put to inconvenience by the refusal of it, the court of appeals will not determine that such refusal was an abuse of the discretion conferred by law upon the county court.³¹⁹

§ 174. *Certiorari* to Review Proceedings.

The object of this writ is narrow and special. It is concerned with the determination of jurisdiction and with errors apparent on the record, and, as a rule, does not involve a re-examination of the evidence. Hence, when the proceedings of a licensing board or court are brought up on *certiorari*, its decisions on questions of fact are not to be reviewed, although errors of law committed by it may be remedied.³²⁰ Where the statute prohibits the granting of a license, when objected to by the owners of the adjoining property, any such land-owner has such an interest as entitles him to a writ of *certiorari* to determine whether the notice of the application for the license required by the statute was given, that being a jurisdictional prerequisite.³²¹ So also, remonstrants against granting licenses may present special facts affecting the jurisdiction of the licensing authority, and if refused a hearing at a time and place within the discretion of such authority, such facts may be shown on *certiorari* to defeat licenses granted.³²² As a rule, this writ cannot be brought where there was no objection or remonstrance against the grant of the particular license.³²³ But in Pennsylvania, under a local act for the licensing of wholesale dealers, where the county court has not the same discretion as in the case of retailers, it is held that the proceedings of that court are reviewable by the supreme court on *certiorari*, even where there is no remonstrance filed or objection made.³²⁴

³¹⁸ *Groscap v. Rainier*, 111 Ind. 361, 12 N. E. Rep. 694.

³¹⁹ *Hoglan v. Comm.*, 3 Bush, 147.

³²⁰ *Jane v. Alley*, 64 Miss. 446, 1 South. Rep. 497.

³²¹ *Dexter v. Town Council of Cum-berland*, (R. I.) 21 Atl. Rep. 347.

³²² *State v. Atlantic City*, 48 N. J. Law, 118, 3 Atl. Rep. 65.

³²³ *Lexington v. Sargent*, 64 Miss. 621, 1 South. Rep. 903.

³²⁴ *In re Pollard*, 127 Pa. St. 507, 17 Atl. Rep. 1087.

§ 175. Restraining Grant of License.

If the power to grant or refuse licenses is vested in a board of commissioners, and the matter is placed exclusively within their jurisdiction, their action in granting a license is *quasi* judicial, and if the grant would be improper, the remedy is by appeal, writ of error, or *certiorari*, according to the nature of the error complained of, but an injunction will not be granted to prevent the issuing of the license;³²⁵ at least, if no abuse of authority or actual corruption is alleged.³²⁶ And if, in any particular town or county, the granting of licenses is prohibited by law, so that a license issued there would be nugatory and void, no writ of prohibition is necessary to restrain the grant of such license.³²⁷

§ 176. Criminal Responsibility of Licensing Board.

If the persons authorized by law to grant licenses, being fully informed that they have a legal discretion in the matter, perversely abuse their discretion by obstinately resolving not to exercise it at all, or not to grant any licenses, or by exercising it in a way purposely to defeat the legislative intention, or to oppress an individual, such an intentional (and therefore corrupt) violation of duty and law must be answered for on indictment.³²⁸ And so, on the other hand, they may be indicted for granting licenses to persons not possessing the statutory qualifications, if they knew that fact, or should have ascertained it in the fulfillment of their duty, although they are not liable for an error of judgment. They are not judicial officers, and the general principle is, that when the common law or statute forbids the doing of a thing, (as, granting a license to a person not qualified,) the doing of it wilfully is indictable, though the motive is not corrupt.³²⁹ On such an indictment, where there is evidence from

³²⁵ Northern Pac. R. Co. v. Whalen, 3 Wash. Ter. 452, 17 Pac. Rep. 890.

³²⁶ Leigh v. Westervelt, 2 Duer, 618.

³²⁷ Beckham v. Howard, 83 Ga. 89, 9 S. E. Rep. 784.

³²⁸ Attorney General v. Justices of Guilford, 5 Ired. 315; State v. Kite, 81 Mo. 97.

³²⁹ People v. Norton, 7 Barb. 477.

which the jury might find that the defendants had entirely failed in their official duty to ascertain the licensee's disability, and the want of the required accommodations for travelers in his house, before issuing the license, the evidence is sufficient to sustain a conviction.³³⁰

§ 177. Action for Refusal to Issue License.

An application for a license to sell intoxicating liquors is in the nature of a judicial proceeding, and therefore the board of commissioners are not personally liable in an action against them to recover damages alleged to have resulted from their action in such a proceeding.³³¹ It seems, however, that an action might lie against persons who maliciously opposed or obstructed a party's application for such a license. But in a case in Nebraska, where the complaint alleged that the city council ordered the city clerk to issue a license to the plaintiffs upon the payment of the license fee, which they took with them and tendered to the city treasurer, and demanded of the city clerk to issue and deliver to them the license, which demand the clerk, being instigated by the defendants, wrongfully refused, it was held that the complaint did not state a cause of action, because tender of the fee, without actual payment, was not enough to entitle them to the license.³³²

§ 178. License not Collaterally Impeachable.

If it is desired to contest the validity or regularity of the action of the authorities in granting or refusing a license, it must be done in one of the modes we have already discussed, that is, by appeal, *mandamus*, *certiorari*, or some other appropriate proceeding. The legality or propriety of their action cannot be inquired into in any collateral action.³³³ Notwithstanding the anterior proceedings may have been irregular, a license actually granted will protect the holder.³³⁴

³³⁰ *People v. Worsley*, (Sup.) 1 N. Y. Supp. 748, 17 N. Y. St. Rep. 610. See *People v. Jones*, 54 Barb. 311.

³³¹ *Halloran v. McCullough*, 68 Ind. 179.

³³² *Claus v. Hardy*, (Nebr.) 47 N. W. Rep. 418.

³³³ *Goff v. Fowler*, 3 Pick. 300; *City Council v. Hollenback*, 3 Strobb. 355; *Hornaday v. State*, 43 Ind. 306.

³³⁴ *Goff v. Fowler*, 3 Pick. 300.

PART VII. LICENSE FEES.

§ 179. License Fees not Taxation.

As we have already had occasion to observe, the exaction of a fee for the privilege of a license to sell liquors is essentially distinguishable from the imposition of a tax upon the business. Under a constitutional prohibition against the licensing of the liquor traffic, the legislature still has power to impose taxes upon it.³³⁵ And conversely, a fee received for a license for the sale of liquor, granted by the state or a municipal corporation, is not a tax, within the meaning of the constitutional provision requiring equality and uniformity in taxation.³³⁶

§ 180. Fixing Amount of Fees.

The system of classification by population, for the purpose of fixing the minimum license fee in the several townships and cities, is a valid classification, and imparts to the law the quality of general legislation.³³⁷ And where, as in Wisconsin, the statute fixes the license fees according to population, and provides that "the population of any city or village shall be ascertained by the last preceding enumeration by the state or general government," it is held that the method of ascertaining population thus pointed out is exclusive of any other, and it cannot be proved by parol or by application for a new census.³³⁸

§ 181. Reasonableness of Amount.

If the state, in the exercise of its police power, may entirely prohibit the sale of intoxicating liquors, which is now conceded, it must follow that, in determining to license the traffic, it may fix the fee to be charged at such a figure as will best conduce to promote the ends

³³⁵ *Supra*, § 108.

³³⁶ *Lovington v. Board of Trustees*, 99 Ill. 564.

³³⁷ *State v. Circuit Court*, 50 N. J. Law, 585, 15 Atl. Rep. 272.

³³⁸ *State v. Keaough*, 63 Wis. 135, 31 N. W. Rep. 723. See *Comm. v. Smoulter*, 126 Pa. St. 137, 17 Atl. Rep. 532; *Comm. v. Miller*, 126 Pa. St. 137, 17 Atl. Rep. 623; *Foster v. Burt*, 76 Ala. 229.

which such regulative laws have in view. Revenue is not the chief object of license laws; it is not even their primary purpose. The principal aim of such statutes is to restrict the number of persons engaging in the liquor traffic, to regulate the conduct of their business, and, by such restriction and regulation, to promote the welfare and the moral health of society. They are therefore enacted in the exercise of the police power. And if the required fee for a license is made so high as to be practically prohibitive, it cannot be said to be beyond the power of a law-making body which might have prohibited the trade directly. On an even stronger reason, this is true of a law or ordinance fixing the license fees at a rate calculated to be restrictive, or only partially prohibitive. No question as to the adequacy or excessiveness of the amount charged can properly be propounded to the courts.³³⁹ The reasons for this doctrine are more fully stated by an eminent writer, as follows: "The business [of manufacturing and selling liquor] is one that affects the public interest in many ways, and leads to many disorders. It has a tendency to increase pauperism and crime. It renders a large force of peace officers essential, and it adds to the expenses of the courts, and of nearly all branches of civil administration. It cannot be questioned, therefore, if it is to be licensed by the public authorities, that it is legitimate and proper to take into the account all the probable consequences, or that the payment to be exacted should be sufficient to cover all the incidental expenses to which the public are likely to be put by means of the business being carried on. And all reasonable intendments must favor the fairness and justice of a fee thus fixed; it will not be held excessive unless it is manifestly something more than a fee or regulation."³⁴⁰ The adjudged cases are also in harmony with the views here expressed. For example, in California, it is held that it will not be presumed, as a matter of law, that fifty dollars a month for retail liquor licenses is oppressive or unreasonable.³⁴¹

³³⁹ *Dennehy v. City of Chicago*, 120 Ill. 627, 12 N. E. Rep. 227; *Tenney v. Lenz*, 16 Wis. 566; *City of New Orleans v. Clark*, 42 La. Ann. 9, 7 South. Rep. 58.

³⁴⁰ *Cooley*, Taxation, 599.

³⁴¹ *In re Guerrero*, 69 Cal. 88, 10 Pac. Rep. 261.

§ 182. Ordinances Increasing Amount of Fee.

Some question has been made of the power of a municipal corporation to increase the amount of the fee charged for licenses, in relation to licenses already in force, or applied for, at the time of the change. In a case in Missouri, where the city, before passing upon an application for license made by one who had complied with all the existing regulations, adopted an ordinance raising the price of licenses, and refused the license applied for without payment of the increased sum, it was held that it might be compelled to issue a license at the original price. But this was because the action of the city was in violation of an ordinance of its own, previously adopted, providing that no proceeding pending at the time of the repeal of any ordinance should be affected in any way by such repeal.³⁴² On the other hand, the supreme court of Indiana holds that where a license to sell liquors in a city for a year, on payment of a certain sum, has been granted, the city, before the end of the year, can by ordinance raise the fee for the unexpired term. In the case in which this decision was made it is said: "It is contended that the municipal authorities had no power, under the statute in question, to enact an ordinance increasing the amount of the license fee, and make it applicable to unexpired licenses, thereby practically annulling permits theretofore issued by the city. While conceding that a license is not an absolute contract in which the licensee obtains a vested right, during the full period for which it was granted, to sell upon the same terms as when the license was issued, it is contended that it is nevertheless, in some sense, a contract between the city and the licensee, under which the latter acquires an absolute right to sell liquors during the term, subject to municipal regulation, without being required to pay an enhanced price simply for the purpose of increasing the city revenue. Moreover, it is contended that a license to retail intoxicating liquors is a thing of value, in the nature of property; and that even if the legislature had the power to amend existing licenses, or authorize it to

³⁴² *State v. Baker*, 32 Mo. App. 98.

be done, good faith required that the money paid for the unearned portion be refunded. Finally, it is said the ordinance is invalid, as applied to cases like the present, within the principle which denies, in the absence of clearly expressed intent to the contrary, the power to give a law or ordinance a retrospective or retroactive operation." But the court did not deem it necessary to enter upon an elaborate discussion of the several propositions involved, observing that it was sufficient to say that principles as firmly settled as anything could be, upon the highest judicial authority, swept away every vestige of the foundation upon which the argument against the validity of the ordinance rested. "When it is conceded, as it is and must be, that a law regulating, or authorizing municipal corporations to regulate and impose restrictions upon, the sale of intoxicating liquors, is an exercise of the police power of the state, then it follows inevitably that neither the state nor the municipality can, by any sort of contract, license, or permit, abdicate, embarrass, or bargain away its right to exercise this power in such manner as it may thereafter deem the public welfare requires. It is the peculiar province of the state, either by legislative enactment or through authority delegated to municipalities, to exert its police power for the protection of the lives, health, and property of its citizens, as well as to maintain good order and preserve public morals. It is everywhere conceded that the traffic in intoxicating liquors affects all these subjects, and that it is hence a proper subject for police regulation. It is essential, therefore, that the power to regulate should be a continuing one, ever present and available, to be exercised by the state as emergencies may require. Hence the rule that neither the state nor any of its agencies to whom the power has been delegated can divest itself of the right to impose such other or additional restrictions upon the sale of intoxicating liquors as the maintenance of good order, or the preservation of the public morals, may seem to require. . . . If, by authorizing a license or permit for one year, the state could deprive itself of the right to impose new restrictions upon the licensee during that period, a law authorizing licenses might bind successive legislatures for three, five, or even ten years. If the legislative discretion could be fettered or bargained away for one

year, it could, upon the same principle, be bargained away for an indefinite period. It is, however, abundantly settled that a license or permit issued in pursuance of a mere police regulation has none of the elements of a contract, and that it may be changed or entirely revoked, even though based upon a valuable consideration. A license issued under the law regulating the sale of intoxicating liquors has neither the qualities of a contract nor of property, but merely forms a part of the internal police system of the state. No one can acquire a vested right in a mere statutory privilege so as to bind the state, or prevent a change of policy as the varying interests of society may require. . . . The enactment of a law placing restrictions upon the sale of intoxicating liquors, and requiring the payment of a specified sum of money, and that a license be obtained, before the business of selling can lawfully be entered upon, is not to be regarded as a proposition on the part of the state to contract for privileges or to sell indulgences, but rather as a public proclamation announcing that the state regards the unrestricted sale of intoxicating liquors as prejudicial to the general welfare, and that in the exercise of its police power the traffic has been placed under regulation and restraint. Those who engage in the traffic after the enactment of such a law, must be regarded as having notice from the beginning that the power of regulation is a continuing one, and that the state reserves to itself the right to deal with the subject as the special exigencies of the moment may require. They are bound to know that the license or permit has no force or vitality except as it derives it from the law under which it was issued, and that, if the public good requires that the law be modified or repealed, no incidental inconvenience which they may suffer can stay the hand of the state. No one can acquire a vested right in the law.”³⁴³

§ 183. Payment in Advance Required.

As a rule, the license laws direct that the fee required shall be paid to the proper officer before the license shall be issued, or before the party can lawfully commence business. Under such a provision,

³⁴³ Moore v. Indianapolis, 120 Ind. 483, 22 N. E. Rep. 424.

no valid license can be issued unless the amount of the fee be paid in advance for the entire period covered by the license.³⁴⁴ The law is peremptory, and no discretion is left to the officer to waive or modify its terms.³⁴⁵ Further, the whole amount must be paid. The payment of a less sum for a license than that required by law is not to be regarded as good *pro tanto*; it does not authorize any license to be issued; and if any license is issued on such part payment, it is a nullity.³⁴⁶ Still it has been held that if, in violation of their own ordinance prescribing that a certain fee shall be paid before a license shall issue, the mayor and council of a town permit one who has paid only a portion of the required fee to do business, they cannot subject to the payment of the balance the stock in trade of the delinquent in the hands of an innocent purchaser.³⁴⁷

§ 184. License Fee Payable in Money.

It is a general and well settled rule that in all cases where it is not otherwise provided by statute, taxes, assessments, and fees in the nature of taxes are payable in cash, and the officer charged with their collection has no authority to receive anything in payment but legal tender money or such money as passes current at the time.³⁴⁸ This rule is applied to the collection of fees for liquor licenses. It is held that if a liquor-dealer offers his promissory note in payment of the fee, the collecting officer has no power to receive it; and if he does receive it, the note is void as in violation of public policy, and the officer is personally liable to the state or municipality for the amount.³⁴⁹ There are two states, however, in which this rule does not appear to be recognized. In Georgia and Alabama, it is held that while the taking of a note in such cases is not regular, yet the note, if accepted by the officer, may be collected by suit against the

³⁴⁴ Handy v. People, 29 Ill. App. 99.

³⁴⁵ McWilliams v. Phillips, 51 Miss. 196.

³⁴⁶ Spake v. People, 89 Ill. 617.

³⁴⁷ Wicker v. Siesel, 80 Ga. 724, 6 S. E. Rep. 817.

³⁴⁸ See McLanahan v. Syracuse, 18 Hun, 259; Staley v. Columbus, 36 Mich.

38; Richards v. Stogsdell, 21 Ind. 74; Dickson v. Gamble, 16 Fla. 687; Black, Tax-Titles, § 50; Cooley, Taxation, 452.

³⁴⁹ Doran v. Phillips, 47 Mich. 228, 10 N. W. Rep. 350; McWilliams v. Phillips, 51 Miss. 196; City of Craig v. Smith, 31 Mo. App. 286.

maker.³⁵⁰ As to the receivability of state or municipal obligations in satisfaction of these dues, the question will depend upon whether the terms of the law authorizing the tender of such obligations in payment of public charges are broad enough to include license fees. For example, where the law creating the office of police commissioners provides that their certificates of indebtedness shall be receivable in payment of all city *taxes*, a tender of such certificates in payment of the fee for a liquor license is not a sufficient tender; for a license fee is not a tax.³⁵¹

§ 185. Collection of License Fees.

It may be stated as a general rule that taxes, and charges in the nature of taxes, are not debts in the ordinary acceptance of that term, and hence, a common law action of debt will not lie for their recovery. The methods of collection are those only which are authorized by the statute, and if the statute does not give a remedy by process of civil action, such action cannot be sustained, except possibly in the case of a law providing no means of collection whatever.³⁵² Applying this principle to the case in hand, we find the authorities holding that one who carries on the liquor business without having paid for the necessary license does not thereby become indebted to the state or municipality for the amount of the fee in such sense that it can be recovered by suit against him.³⁵³ Thus, a statute which fixes the liability for selling liquor without license, provides a punishment therefor, and authorizes the sheriff to assess and collect the tax, provides an exclusive remedy, and the state cannot sue for the collection of back taxes from persons who have sold without license.³⁵⁴

³⁵⁰ *Appling Co. v. McWilliams*, 69 Ga. 840; *Powers v. Mayor of Decatur*, 54 Ala. 214.

³⁵¹ *East St. Louis v. Wehrung*, 46 Ill. 392.

³⁵² *Black, Tax-Titles*, § 45; *Cooley, Taxation*, 15-18.

³⁵³ *City of Chicago v. Enright*, 27 Ill. App. 559; *State v. Adler*, (Miss.) 9 South. Rep. 645.

³⁵⁴ *State v. Piazza*, 66 Miss. 426, 6

South. Rep. 316. A later law in this state provides for a revenue agent, whose duty it is to collect delinquent revenues of the state. But *held*, that he is not authorized to proceed against one violating the license law until the sheriff, knowing of the violation, neglects or refuses to collect the tax. *State v. Thibedeaux*, (Miss.) 10 South. Rep. 58.

In some states, however, the statutes on this subject are so framed as to authorize, either directly or by necessary implication, the collection of unpaid license fees by ordinary suit or action.³⁵⁵ In Mississippi, under a provision of the code that courts of chancery shall have jurisdiction of suits to restrain the collection of taxes, levied or attempted to be collected without authority of law, such a court has jurisdiction of a suit by a saloon-keeper to restrain the collection of the license tax on his business, for the privilege of retailing, imposed by the statute in that behalf.³⁵⁶ In Kentucky, where the law provides that licenses shall be granted by the county court, it is held that the county clerk, and not the county judge, is the proper person to collect and receive commissions on fees.³⁵⁷

§ 186. Disposition of License Moneys.

The money received for license fees will be disposed of according to the local statute,—to the various municipal corporations, to public institutions, to the school districts, to the poor fund, or otherwise according as the statute may direct. It is said that *mandamus* will lie to compel a county treasurer to pay over to the proper local officers the amount of liquor taxes to which they are entitled by the law.³⁵⁸ But where money due to a township for liquor license is paid, by mistake of the county treasurer, to a village in the township, the amount thus paid may be deducted by him from moneys due the village, for licenses, subsequently accruing to it.³⁵⁹ In New Jersey, it is held that when the license granted is to be exercised and enjoyed in a locality which is included in a town, and is also included in a township, the two municipalities being co-existent over the territory included in the town, the fee is required to be paid to the person having the legal custody of the funds of the township, and not to the town.³⁶⁰ In Nebraska, it is held that the authorities are not empow-

³⁵⁵ Hall v. Bastrop, 11 La. Ann. 603; *Ex parte* Benjamin, 65 Cal. 310, 4 Pac. Rep. 23.

³⁵⁶ Portwood v. Baskett, 64 Miss. 213, 1 South. Rep. 105.

³⁵⁷ Severance v. Kelly, 86 Ky. 522, 6 S. W. Rep. 386.

³⁵⁸ East Saginaw v. Saginaw Co. Treas'r, 44 Mich. 273, 6 N. W. Rep. 684.

³⁵⁹ Village of Grosse Point v. Wayne Co. Treas'r, (Mich.) 48 N. W. Rep. 153.

³⁶⁰ State v. Slack, 52 N. J. Law, 113, 18 Atl. Rep. 687.

ered to dispose of money paid into the treasury as a fee for obtaining a license, until the license for which it has been paid has been issued; until that time, the money is the property of the applicant, and subject only to his disposal.³⁶¹ But in some other states, the rule obtains that the payment is a condition precedent, not a deposit, and goes at once into the general fund of the municipality.³⁶²

§ 187. Recovery of Excessive or Illegal Fee Paid.

Where a person, applying for a license to sell liquor, *voluntarily* pays the whole amount demanded of him, although the charge is illegal, or the amount demanded, in consequence of a misapprehension of the law, or of the invalidity of a particular statute or ordinance, is in excess of the sum which might lawfully be exacted under the law of the state or the charter of the municipality, he cannot recover back the amount paid or the illegal excess.³⁶³ "The principle," says Judge Cooley, "is an ancient one in the common law, and is of general application. Every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as the reason why the state should furnish him with legal remedies to recover it back. Especially is this the case when the officer receiving the money, who is chargeable with no more knowledge of the law than the party making payment, is not put on his guard by any warning or protest, and the money is paid over to the use of the public in apparent acquiescence in the justice of the exaction."³⁶⁴

In the state of Georgia, a ruling was once made that where a municipal corporation, without any authority of law, levied and collected a license fee for the sale of liquor, it was liable to refund the money so collected in an action brought by the party paying the

³⁶¹ State v. Mayor of Lincoln, 6 Nebr. 12.

³⁶² Trainor v. Multnomah Co., 2 Oreg. 214.

³⁶³ Emery v. Lowell, 127 Mass. 133; Thomson v. Norris, 62 Ga. 538; Tupelo v. Beard, 56 Miss. 532; Ligonier v.

Ackerman, 46 Ind. 552, 15 Am. Rep. 323; Sullivan v. McCammon, 51 Ind. 264; Edinburg v. Hackney, 54 Ind. 83; Brazil v. Kress, 55 Ind. 14; Kraft v. City of Keokuk, 14 Iowa, 86; Custin v. Viroqua, 67 Wis. 314, 30 N. W. Rep. 515.

³⁶⁴ Cooley, Taxation, 809.

same.³⁶⁵ But afterwards the court declared that this decision would not be extended beyond the facts of the particular case; that is, it would be applied only in cases where the municipality, in assuming to license liquor-dealers, acts *wholly without jurisdiction* over the subject-matter. And the general rule on the subject was stated in the following full and explicit terms: Where a municipal corporation has jurisdiction to grant such license, and a party voluntarily applies therefor and voluntarily pays the price of the license to the clerk of the council, without the issuing of execution or compulsory process of any kind, or any threat to do so, or to punish him in any way if he does not take out the license, and then sues to recover back a part of the money so voluntarily paid, viz., that part which is over and above the tax or license fee authorized by the charter of the corporation before the passing of an unconstitutional ordinance or amendment to the charter, increasing the license tax to the amount he paid, the rule is, that such payment of the overplus made by the plaintiff voluntarily, and without any process or compulsory proceedings, cannot be recovered back from the corporation.³⁶⁶

It will be apparent from the foregoing that the word "voluntarily," as used in the statement of this rule, is to be taken in a sense more restricted than its meaning in common speech. A payment may be made reluctantly, or even under some degree of pressure, and yet be voluntary in the contemplation of the law. The mere fact, for instance, that the business necessities of the plaintiff compelled him to pay the excessive license fee does not alter the voluntary character of the payment.³⁶⁷ The rule is that if the payment is made without protest, and not to procure the release of the plaintiff's person or property from arrest or seizure, and not compelled by the exhibition of compulsory process or its actual or threatened enforcement, and without the use of any force, fraud, menaces, or intimidation on the part of the municipality or its officers or agents, then the payment is considered as made voluntarily.³⁶⁸ And the declaration or

³⁶⁵ Callaway v. Mayor of Milledgeville, 48 Ga. 309. See, also, Douglasville v. Johns, 62 Ga. 423.

³⁶⁶ Thomson v. Norris, 62 Ga. 538.

³⁶⁷ Custin v. Viroqua, 67 Wis. 314, 30 N. W. Rep. 515.

³⁶⁸ Edinburg v. Hackney, 54 Ind. 83;

complaint of the plaintiff, as well as his evidence, must show that the money was not paid voluntarily.³⁶⁹ In some states, it is held that if the payment is made under a formal protest, this will remove the objection that the party paid voluntarily, and will authorize him to recover.³⁷⁰ But it is doubtful whether this exception would be universally allowed, unless where the statute specifically provides for such protest and gives it the effect indicated.³⁷¹

§ 188. Refunding Money on Refusal or Cancellation of License.

It is held that an action for money had and received will not lie to recover the fee paid to a county treasurer for a license, on his refusal to grant it. The payment is a condition precedent, not a deposit, and goes at once into the general county fund.³⁷² So where the applicant pays for his license on taking it out, not being bound to do so until the expiration of the time for taking an appeal, and, on appeal, the license is refused, the county is not liable to refund any part of the money.³⁷³ On the same principle, where a remonstrance against a license was overruled by the city council, the amount paid, and the license issued, no appeal having been taken in a reasonable time, and subsequently the license was cancelled by the district court, it was held that the treasurer could not be compelled to refund the money.³⁷⁴ Nor can the license fee be recovered because an order prohibiting the sale of liquor in the territory covered by the license is made immediately after it was granted, on the application of a majority of the inhabitants.³⁷⁵ On an even stronger reason, a person who voluntarily pays the liquor tax, and afterwards abandons the business because he is unwilling or unable to furnish the required

Brazil v. Kress, 55 Ind. 14; Thomson v. Norris, 62 Ga. 538.

³⁶⁹ Sullivan v. McCammon, 51 Ind. 264.

³⁷⁰ Catoir v. Watterson, 38 Ohio St. 319; Baker v. Cincinnati, 11 Ohio St. 534.

³⁷¹ See Emery v. Lowell, 127 Mass. 188; Cooley, Taxation, 813.

³⁷² Trainor v. Multnomah Co., 2 Oreg. 214. Compare State v. Mayor of Lincoln, 6 Nebr. 12.

³⁷³ Monroe Co. Comm'rs v. Kreuger, 88 Ind. 231.

³⁷⁴ Lydick v. Korner, 15 Nebr. 500, 20 N. W. Rep. 26.

³⁷⁵ Peyton v. Hot Spring Co., 58 Ark. 236, 13 S. W. Rep. 764.

bond, cannot recover the amount of the tax so paid.³⁷⁶ But in Illinois, it is held that where a party receives a license from a city, and pays for it, the city cannot, by repudiating the act of the officer who issued the license, maintain an action against such party, without returning the money paid for the license.³⁷⁷

PART VIII. REVOCATION OF LICENSES.

§ 189. Power to Revoke Licenses.

A license to sell liquor is neither a contract nor a right of property, within the legal and constitutional meaning of those terms. It is no more than a temporary permit to do that which would otherwise be unlawful, and forms a part of the internal police system of the state. Hence the authority which granted a license always retains the power to revoke it, either for due cause of forfeiture, or upon a change of policy and legislation in regard to the liquor traffic. And such revocation cannot be pronounced unconstitutional, either as an impairment of contract obligations, or as unlawfully divesting persons of their property or rights.³⁷⁸ On this principle, the revocation by a municipal corporation of a license to sell liquor, granted upon certain specified conditions, a violation of which, according to the express terms of the license, should have the effect to revoke it, is not a forfeiture beyond the powers of the corporation; for a license is not property in such sense that a revocation of it may be said to be a forfeiture.³⁷⁹ And where, by a city ordinance, the city council has authority at any time to annul a license actually issued under its order, *a fortiori* it may rescind an order granting a license, where the license has not yet issued.³⁸⁰

³⁷⁶ *Curry v. Tawas Tp.*, 81 Mich. 355, 45 N. W. Rep. 831.

³⁷⁷ *Martel v. East St. Louis*, 94 Ill. 67.

³⁷⁸ *Supra*, §§ 127-129; *Brown v. State*, 82 Ga. 224, 7 S. E. Rep. 915; *Fell v. State*, 42 Md. 71; *Calder v. Kurby*, 5 Gray, 597; *Comm. v. Brennan*, 103 Mass. 70; *Martin v. State*, 23 Nebr. 371,

36 N. W. Rep. 554; *Pleuler v. State*, 11 Nebr. 547, 10 N. W. Rep. 481; *Sprayberry v. City of Atlanta*, (Ga.) 13 S. E. Rep. 197. Compare *State v. Baker*, 33 Mo. App. 98.

³⁷⁹ *Hurber v. Baugh*, 43 Iowa, 514.

³⁸⁰ *Sights v. Yarnalls*, 12 Gratt. 292.

§ 190. Revocation by Repeal of Law.

All existing and unexpired liquor licenses are of course revoked or annulled by the adoption of the system of total prohibition in the state, by statute or constitutional amendment.³⁸¹ And in the same way, the adoption of a local option law in any particular district will have the effect of abrogating all licenses previously granted to be exercised in its limits.³⁸² And in general, this is the consequence which follows the repeal of the law under which the license was granted. On this point the supreme court of Ohio remarks that, connected as the subject is with the public police and domestic regulations of the state, it is clear that the legislature has the power, on the ground of protecting the health, morals, and good order of the community, to revoke, or provide the mode of revoking, the unexpired licenses granted under a former act which is afterwards repealed; but the exercise of this power, without refunding the money obtained for the license, would be an act of bad faith; and as repeals by implication are not favored, and penal statutes are strictly construed, such an operation will not be given to the law by mere implication, in the absence of words directly and clearly expressive of such an intention.³⁸³

§ 191. Jurisdiction for Revocation.

As a general rule, the jurisdiction for the revocation of a license is vested in the same board, court, or officer who possesses the power to grant licenses. Thus, in Pennsylvania, the courts of quarter sessions have the power to revoke duly granted licenses, upon sufficient cause being shown.³⁸⁴ But where a general law of the state provides that certain violations of the liquor law (as, for instance, selling to minors) shall be attended by the forfeiture of any retail license the offender may hold, the city license of one who is convicted of such offense must be revoked, although, under its charter, the city is invested with exclusive authority "to license, tax, regulate, restrain,

³⁸¹ *Supra*, §§ 84, 90, 127.

³⁸² *Supra*, §§ 101, 127.

³⁸³ *Hirn v. State*, 1 Ohio St. 15.

³⁸⁴ *Dolan's Appeal*, 108 Pa. St. 564.

suppress, and prohibit bar-rooms, groceries, and tippling-houses," and also power "to impose forfeitures."³⁸⁵

§ 192. Causes for Revocation of License.

It may be stated as a general rule that if the holder of a license to sell liquor is convicted of an offense against the liquor laws of the state, or against the municipal ordinance under which the permit was granted, this will work a forfeiture of his license, or constitute a cause for which the license may be revoked.³⁸⁶ But there are different provisions in the different states as to the method of ascertaining the existence of a cause of forfeiture, or the degree of proof which will justify action on the part of the authorities empowered to revoke the license. Where, as in some states, the statute declares that the "conviction" of the licensee, by a court of competent jurisdiction, of an offense against these laws, shall annul his license, it is held that nothing less than a final judgment, conclusively establishing guilt, will satisfy the meaning of the word "conviction," and a verdict, not followed by a judgment, is not sufficient.³⁸⁷ But in other states, the license commissioners are to act upon evidence of a breach of the laws presented directly to them, and their findings will not be disturbed on review, unless it appears that they were not authorized, as a matter of law, to draw the inference they did.³⁸⁸ Under the rule that a master is responsible for the acts of his servant, at least when committed in his presence or with his knowledge and permission, it is held that if a bar-tender is convicted of making an illegal sale, under such circumstances, this will justify the revocation of the principal's license.³⁸⁹ In some states, the forfeiture of the license is a consequence of a conviction for carrying on or permitting gambling in the place licensed, and this is to be decreed by the court when the jury have found the substan-

³⁸⁵ *State v. Horton*, (Oreg.) 27 Pac. Rep. 165.

³⁸⁶ *Ballentine v. State*, 48 Ark. 45, 2 S. W. Rep. 340; *Martin v. State*, 23 Nebr. 371, 36 N. W. Rep. 554; *People v. Meyers*, 95 N. Y. 223; *Ottumwa v. Schaub*, 52 Iowa, 515, 3 N. W. Rep. 529; *Davis v. Comm.*, 75 Va. 944.

³⁸⁷ *Comm. v. Kiley*, 150 Mass. 325, 23 N. E. Rep. 55.

³⁸⁸ *Rodden v. License Comm'rs*, (R. I.) 21 Atl. Rep. 1020.

³⁸⁹ *People v. Meyers*, 95 N. Y. 223. *People v. Woodman*, (Com. Pl. N. Y.) 3 N. Y. Supp. 926, 22 N. Y. St. Rep. 220.

tive fact charged.³⁹⁰ Where the person's license expires, and is renewed for a year, after the commission of an offense, but before a conviction therefor, it is held that a revocation of the new license is proper; the power of revocation is not limited to the license in force at the time of the violation of the law.³⁹¹ A remonstrance against the issue of a license having been overruled, and an appeal taken, the revocation of a license issued before the appeal is disposed of will be compelled by *mandamus*, although there may have been some delay in perfecting the appeal.³⁹²

§ 193. Notice to Licensee.

If the statute directs that the holder of a license shall be notified of the institution of proceedings to revoke the same, and be summoned to appear and show cause against the complaint, the proceedings will be void unless these requisites are complied with.³⁹³ But if the law makes provision for a hearing, it is implied that the licensee shall have notice and an opportunity to defend; and although no specific direction for such notice is given, yet the law cannot be objected to on that ground,³⁹⁴ nor can the authorities proceed without giving notice.³⁹⁵ In Georgia, however, it is said that where the license itself contains the conditions of forfeiture, as prescribed by the ordinance under which it was granted, the licensee, on conviction of a violation of the law, is not entitled to any notice of the forfeiture of his license.³⁹⁶ Where the license is in form a proper license to a partnership, it is unnecessary to give notice of the hearing on

³⁹⁰ *Ballentine v. State*, 48 Ark. 45, 2 S. W. Rep. 340. Where the licensee rented an adjoining room, and connected it with the saloon by a door-way, knowing that it was to be used by the lessee for gaming purposes, and a game of faro was there carried on under the lessor's observation and with his permission, *held*, that he was guilty of knowingly permitting gaming to be carried on in his house, so that his license might properly be revoked. *Brockway v. State*, 36 Ark. 629.

³⁹¹ *People v. Woodman*, (Super. N. Y.) 4 N. Y. Supp. 532, 22 N. Y. St. Rep. 435.

³⁹² *State v. Bays*, (Nebr.) 48 N. W. Rep. 270.

³⁹³ *Plummer v. Comm.*, 1 Bush, 26.

³⁹⁴ *Young v. Blaisdell*, 138 Mass. 344.

³⁹⁵ *Gaertner v. Fond du Lac*, 34 Wis. 497.

³⁹⁶ *Sprayberry v. Atlanta*, (Ga.) 13 S. E. Rep. 197.

an application for its revocation to more than one member of the firm.³⁹⁷ In Massachusetts, it is ruled that if any notice to a licensee, that his license has been revoked, is necessary, a verbal notice is enough, the statute not providing for a written notice.³⁹⁸

§ 194. Proceedings and Evidence.

In some of the states, it is enacted by law that proceedings for the revocation of a license shall be founded on a complaint made to the licensing authorities. Where this is the case, it is not sufficient, to authorize the board to issue a warrant, that matter of complaint has come to their knowledge.³⁹⁹ The complaint must aver the existence of a license.⁴⁰⁰ And it must charge the transgression complained of with reasonable certainty. If it merely alleges a violation of a city ordinance, without specifying any offense therein mentioned, or charges illegal sales of liquor, without giving dates, it is fatally defective.⁴⁰¹ But in most of the states, it is considered that the law does not require the same strictness of proceedings or proof, in these cases, that is necessary in actions or special proceedings in courts; the proceeding may be summary,⁴⁰² and the authorities are not required to take the formal proceedings essential to form the basis of a judicial decision affecting life, liberty, or property.⁴⁰³ Nor is this the species of proceeding in which the defendant is entitled, as a matter of constitutional right, to a trial by jury. The object is not punishment, but the revocation of a privilege. The power to license and to cancel licenses being vested in the legislature, the mode and manner in which it shall be done rests in its discretion.⁴⁰⁴ And it is no bar to the proceeding that it is founded on some act or offense for which the defendant has been formerly convicted.⁴⁰⁵ But if the law provides that the licensee "may be summoned before the commissioners, when he and the witnesses for or against him may be heard," it is necessary

³⁹⁷ *Comm. v. Bearce*, 150 Mass. 339, 23 N. E. Rep. 99.

³⁹⁸ *Comm. v. Hamer*, 128 Mass. 76.

³⁹⁹ *State v. Lamos*, 26 Me. 258.

⁴⁰⁰ *Brubaker v. State*, 89 Ind. 577.

⁴⁰¹ *State v. City of Tomah*, (Wis.) 49 N. W. Rep. 753.

⁴⁰² *People v. Haughton*, 41 Hun, 558.

⁴⁰³ *People v. Wright*, 3 Hun, 306, 5 Thomp. & C. 518.

⁴⁰⁴ *Cherry v. Comm.*, 78 Va. 375; *People v. Board of Comm'rs*, 59 N. Y. 92.

⁴⁰⁵ *Cherry v. Comm.*, 78 Va. 375.

that he should be informed of the accusation against him and that witnesses be heard.⁴⁰⁶ And if witnesses are called, it is imperative that they should be sworn.⁴⁰⁷ But where the cause of forfeiture is the conviction of the defendant in a competent court, of a violation of the liquor laws, a proper certificate of such conviction is all the evidence that is necessary.⁴⁰⁸ In some jurisdictions, it is provided that the license shall be revoked if the authorities "shall find the complaint to be true." Under a law of this character, it is held that a resolution that "in view of the evidence presented, the license of the respondent be, and the same is hereby, revoked," is a sufficient finding of the truth of the complaint, without formally expressing that fact.⁴⁰⁹ In regard to continuances or postponements of the hearing, the board or council possess practically the same power, and should be guided in its exercise by the same rules, which obtain in courts of justice.⁴¹⁰

§ 195. Appeal and Review.

A resolution of a board of excise commissioners revoking a license, though not delivered to the person affected, is an act which he is entitled to review on proper proceedings.⁴¹¹ But the acts of the board will not be reviewed in a proceeding to which it is not a party, as, in a criminal prosecution for acts done after the revocation.⁴¹² The proper method of bringing such proceedings before the tribunal having jurisdiction to review them will vary according to the statute and the local practice. In some states, it appears that the regular process for this purpose is by writ of *certiorari*.⁴¹³ But where this remedy is used, it will be presumed that the lower court

⁴⁰⁶ *Deignan v. License Comm'rs*, 16 R. I. 727, 19 Atl. Rep. 332.

⁴⁰⁷ *License Comm'rs v. O'Conner*, (R. I.) 19 Atl. Rep. 1080.

⁴⁰⁸ *Martin v. State*, 23 Nebr. 371, 36 N. W. Rep. 554.

⁴⁰⁹ *State v. City of Beloit*, 74 Wis. 267, 42 N. W. Rep. 110.

⁴¹⁰ See *State v. Common Council*, 41 Minn. 211, 42 N. W. Rep. 1058.

⁴¹¹ *People v. Forbes*, (Sup.) 4 N. Y. Supp. 757, 22 N. Y. St. Rep. 278; *State v. Schmitz*, 65 Iowa, 556, 22 N. W. Rep. 673.

⁴¹² *Comm. v. Hall*, 145 Mass. 216, 13 N. E. Rep. 486.

⁴¹³ *Gaertner v. Fond du Lac*, 34 Wis. 497.

or board had sufficient evidence to show the violation of law charged as a ground for revoking the license.⁴¹⁴ On *certiorari* the question is not whether the court or board found rightly, but whether they were authorized, as a matter of law, to draw the inference they did.⁴¹⁵

§ 196. Effect of Revocation.

The revocation of a license, under due proceedings, absolutely extinguishes the license; and *certiorari* taken to such action is no bar to a prosecution for sales made either during the pendency of the writ, or of an appeal from a judgment affirming the action of the board.⁴¹⁶ Although an ordinance provides that, in certain cases, the town council may revoke any license granted by them to keep dram-shops, and the town constable shall then close up the licensee's shop, yet the town authorities are not justified in ousting the keeper of the shop from his premises by force, and thus depriving him of the use of his property.⁴¹⁷ But when the statute provides that the board are empowered, where necessary, to enter the premises and take possession of the license and cancel it, it is held that no formal revocation is necessary; it is enough if they write to the party that his license is revoked and that they will call on him for it; and they may take the license from his premises the same day they give the notice.⁴¹⁸

PART IX. BONDS OF LICENSEES.

§ 197. Bond as Condition Precedent to Validity of License.

In the states adopting the licensing system, it is generally required that the licensed dealer shall execute a bond, with sureties, conditioned upon his due observance of the laws, and for the payment of

⁴¹⁴ *In re* Carlson, 127 Pa. St. 330, 18 Atl. Rep. 8.

⁴¹⁵ *Rodden v. License Comm'rs*, (R. I.) 21 Atl. Rep. 1020.

⁴¹⁶ *Neuman v. State*, 76 Wis. 112, 45 N. W. Rep. 30.

⁴¹⁷ *Baldwin v. Smith*, 82 Ill. 162.

⁴¹⁸ *People v. Woodman*, (Super. N. Y.) 4 N. Y. Supp. 532, 22 N. Y. St. Rep. 435.

finer and penalties imposed upon him, and, sometimes, for the payment of damages recovered under the civil damage laws. The giving of this bond is held to be an essential condition precedent to the validity of the license; and a license granted without the bond being given is no protection to the holder.⁴¹⁹ An order giving one authority to sell is therefore revocable by the licensing board at any time before the approval of the required bond.⁴²⁰ It is of course essential that the conditions of the bond should contain nothing repugnant to the constitution. But a person who engages in the traffic, without ever executing the bond required, has no right to be heard upon the validity of its conditions.⁴²¹

§ 198. Form and Contents of Bond.

The bond, in respect to its form and conditions, should comply in all matters of substance with the statute directing its execution. If it attempts to impose restraints upon the sale of liquor, additional to those imposed by the statute, it is not valid.⁴²² But its validity is not impaired by the fact that it runs to the village instead of the state, as it should.⁴²³ And it may be made payable to the city or county treasurer without inserting his name, or without containing the words "and his successors in office."⁴²⁴ But if it contains no provision for the payment of all damages which may be adjudged against the licensee, as provided by the statute, the bond is a nullity.⁴²⁵ A bond conditioned that the principal "shall not violate any of the provisions of the laws" of the state, sufficiently complies with a statute requiring a bond conditioned that he "will not violate any of the provisions of this act."⁴²⁶ And so where the form given in the act is that the licensee "shall pay all fines and forfeitures," a bond is good which contains a condition that the licensee "shall pay all damages,

⁴¹⁹ *State v. Fisher*, 33 Wis. 154.

⁴²⁰ *Crutz v. State*, 4 Ind. 385.

⁴²¹ *Ex parte Bell*, 24 Tex. App. 428, 6 S. W. Rep. 197.

⁴²² *Crosby v. Snow*, 16 Me. 121.

⁴²³ *Thomas v. Hinkley*, 19 Nebr. 324, 27 N. W. Rep. 231. But compare *Vil-*

lage of St. James v. Hintgten, (Minn.) 50 N. W. Rep. 700.

⁴²⁴ *Redpath v. Nottingham*, 5 Blackf. 267; *Tripp v. Norton*, 10 R. I. 125.

⁴²⁵ *Sexson v. Kelley*, 3 Nebr. 104.

⁴²⁶ *Providence v. Bligh*, 10 R. I. 203.

finer, costs, and penalties," because "penalties" and "forfeitures" are here synonymous, and the added terms are merely surplusage.⁴²⁷ Where the statute, in one section, requires the licensee to give a penal bond for \$2,000, and, in another section, to guard against the sale of adulterated liquor, requires another bond for \$500, it is held that one bond in the sum of \$2,500, covering all the conditions prescribed for both bonds, is not void for excess in the amount of the penalty.⁴²⁸

§ 199. Approval of Bond.

The statutes require the liquor-dealer's bond to be approved by the court or board granting the license, and invest them with a considerable measure of discretion and judgment, particularly in regard to the sufficiency of the sureties. Unless it is shown that this discretion was unreasonably or arbitrarily exercised, or that they were actuated by illegal or improper motives in rejecting the bond, the process of *mandamus* will not be used to compel their approval of it.⁴²⁹ If it appears that, from their investigation and their own knowledge, they had reason to think that the property of one of the bondsmen was insufficient, this writ will not be granted.⁴³⁰ Nor will their action be disturbed where the testimony as to the value of the property of the persons offered as sureties was conflicting.⁴³¹ That a committee of the council (the licensing authority) has reported favorably on a bond referred to it, and that the city attorney has instructed the council that it is their duty to approve the bond, does not preclude the council from making further investigations.⁴³² When the name of one of the sureties has been erased, apparently after the sureties had qualified, this is a ground, in the exercise of judicial discretion, for refusing to approve the bond.⁴³³ At the same time, it must be

⁴²⁷ *Crawley v. Comm.*, 123 Pa. St. 275, 16 Atl. Rep. 416.

⁴²⁸ *Greene Co. v. Wilhite*, 29 Mo. App. 459.

⁴²⁹ *McHenry v. Chippewa*, 65 Mich. 9, 31 N. W. Rep. 602; *Post v. Township of Sparta*, 64 Mich. 597, 31 N. W. Rep. 535; *Comm. v. Wilson*, (Pa. Sup.) 18 Atl. Rep. 601, 25 W. N. C. 148.

⁴³⁰ *Palmer v. President*, 73 Mich. 96, 40 N. W. Rep. 850.

⁴³¹ *Wolfson v. Rubicon Tp.*, 63 Mich. 49, 29 N. W. Rep. 486; *Post v. Township of Sparta*, 64 Mich. 597, 31 N. W. Rep. 535.

⁴³² *Amperse v. Winslow*, 75 Mich. 234, 42 N. W. Rep. 823.

⁴³³ *Comm. v. Wilson*, (Pa. Sup.) 18 Atl. Rep. 601, 25 W. N. C. 148.

noted that this discretion is confined within reasonable and proper limits. In passing upon the sufficiency of sureties, for example, the board has no right to disregard affidavits without legal proof, or to reject sureties arbitrarily; an abuse of discretion may be remedied by *mandamus*.⁴³⁴ Nor can the authorities reject a liquor-dealer's bond because the principal is a married woman.⁴³⁵

§ 200. Breach of Condition of Bond.

The bond of a liquor-dealer is violated by any offense against the laws for the observance of which it is conditioned, by an abuse or misuse of the privilege, or by selling in quantities, or at times or places, or to persons, other than those allowed by the license.⁴³⁶ It is said that a city is not precluded from claiming the penalty on a license bond because the unlawful sale was made to a police officer sent by the chief for detective purposes, if the sale was not specially induced by anything said or done by the officer.⁴³⁷ Where a license bond is filed in pursuance of a statute requiring the execution of such a bond every year, it relates back to its date, and covers the time prior to its filing.⁴³⁸

§ 201. Actions on Bonds.

Although the statute, directing the license bond to be given to the town or city treasurer, makes no provision for its running to his successors in office, yet an action may be maintained by such successor on a bond so running.⁴³⁹ In Iowa, where the code provides that a suit may be brought on the bond for failure to make the required reports, in the name of the state, on the relation of any citizen of the county, it is held that the right thus given is not inconsistent with another provision, that the district attorney shall bring suit on such bond, but exists as a modification of the district attorney's

⁴³⁴ Potter v. Homer, 59 Mich. 8, 26 N. W. Rep. 208.

⁴³⁵ Amperse v. Kalamazoo, 59 Mich. 78, 26 N. W. Rep. 222.

⁴³⁶ Lightner v. Comm., 31 Pa. St. 341.

⁴³⁷ Tripp v. Flanigan, 10 R. I. 128.

⁴³⁸ Brockway v. Petted, 79 Mich. 620, 45 N. W. Rep. 61.

⁴³⁹ Granger v. Hayden, (R. I.) 20 Atl. Rep. 833.

power.⁴⁴⁰ The previous conviction of the principal, for a violation of the liquor law, is not a prerequisite to a suit on the bond, unless made so by statute.⁴⁴¹ But if such conviction has taken place, the record of it is a sufficient proof of the breach of the bond in a civil action upon it.⁴⁴² And in such action, neither the principal nor sureties will be heard to deny that the license was issued to him in conformity to the law.⁴⁴³ The obligation of the bond is not affected by the fact that the principal has been fined the amount of the penalty, and has served out a term of imprisonment for non-payment of the fine.⁴⁴⁴

§ 202. Damages Recoverable in Suit on Bond.

Unless there is something in the statute to indicate a contrary intention, the license bond will not be held to cover fines or judgments under acts passed after the license was issued and the bond taken.⁴⁴⁵ In Massachusetts, it is held that the surety on such a bond is liable for the amount of a judgment recovered against the licensee under a statute which provides that whoever shall sell or give intoxicating liquor to any minor shall forfeit \$100 for each offense, to be recovered by the parent or guardian of the minor in an action of tort.⁴⁴⁶ In Illinois, in a suit on such bond, exemplary damages cannot be recovered, but only such actual damages as the party for whose use the suit is brought may have sustained, either in person, property, or means of support.⁴⁴⁷

§ 203. Liability of Sureties.

In order to fix the liability of the sureties on a liquor-dealer's bond, it is not necessary to show that the bond was approved by the

⁴⁴⁰ State v. Martland, 71 Iowa, 543, 32 N. W. Rep. 485; State v. Humber, 73 Iowa, 767, 84 N. W. Rep. 829.

⁴⁴¹ Granger v. Hayden, (R. I.) 20 Atl. Rep. 833.

⁴⁴² Welch v. McKane, 55 Conn. 25, 10 Atl. Rep. 168.

⁴⁴³ Schulher v. State, (Miss.) 8 South. Rep. 328.

⁴⁴⁴ Brown v. Comm., 114 Pa. St. 335, 6 Atl. Rep. 152; Stehle v. Comm., (Pa. Sup.) 7 Atl. Rep. 169.

⁴⁴⁵ Crawley v. Comm., 123 Pa. St. 275, 16 Atl. Rep. 416.

⁴⁴⁶ Day v. Frank, 127 Mass. 497.

⁴⁴⁷ Cobb v. People, 84 Ill. 511.

licensing board, although the statute requires that it shall be so approved, or that the sureties were notified of the acceptance of their security, since the issue of the license on the bond implies its approval and acceptance, and no more formal notice is required.⁴⁴⁸ And where the bond is in strict compliance with the statute, the fact that the justification of the sureties annexed to the bond does not conform to the statute, is no defense to the liability of the sureties; nor is the bond invalidated by the negligence of the authorities in accepting it without the proper affidavit of justification;⁴⁴⁹ nor by the failure to file it with the county treasurer, as the law directs, as that is a mere clerical act, and not essential to the validity of the bond.⁴⁵⁰ Where the bond contains the express condition that the sureties shall be liable to pay any judgment rendered against their principal on the bond for actual or exemplary damages in a court of competent jurisdiction, the sureties have no right, in an action against them for the amount of a judgment rendered against the principal, to retry the merits of the original suit in which the judgment was rendered.⁴⁵¹ Where the principal has been convicted of an illegal sale, and has served a term of imprisonment, in default of paying his fine, this does not discharge or release the sureties.⁴⁵²

PART X. TOWN AGENTS.

§ 204. Appointment and Character of Town Agents.

In some of the New England states, where the system of prohibition obtains, in its full or modified form, a person is appointed in each town to purchase intoxicating liquors for the town, and having the exclusive right to sell the same for the permitted purposes, medical, mechanical, scientific, etc. He either receives a fixed salary, or is permitted to make limited profits on his sales. He is not considered

⁴⁴⁸ *Coggeshall v. Pollett*, 15 R. I. 168, 1 Atl. Rep. 413.

⁴⁴⁹ *People v. Laning*, 73 Mich. 284, 41 N. W. Rep. 424.

⁴⁵⁰ *Brockway v. Petted*, 79 Mich. 620, 45 N. W. Rep. 61.

⁴⁵¹ *People v. Laning*, 73 Mich. 284, 41 N. W. Rep. 424.

⁴⁵² *Brown v. Comm.*, 114 Pa. St. 335, 6 Atl. Rep. 152.

a city or town officer. His situation is not an office, but an employment, which ceases if not renewed at the end of the year; he does not hold over until his successor is chosen.⁴⁵³ The town agent has no authority to act until he has given the bond and received the certificate required by the statute.⁴⁵⁴ And unless he gives the bond and otherwise complies with the act, he cannot make the town liable for his purchases by pledging its credit.⁴⁵⁵ Conversely, to support an action by the town against the agent, it must be shown by legal evidence that the latter was duly appointed as such agent.⁴⁵⁶

§ 205. Powers and Duties of Town Agents.

The liquors purchased by the town agent, in pursuance of his appointment, belong to the town, and at the termination of his agency, it is his duty to account to the town for the liquors remaining on hand, and for the proceeds of such as have been sold.⁴⁵⁷ If a state agent is appointed, having the exclusive right to sell to town agents, the towns are not liable for liquors purchased by their agents from others, after notification of the appointment of the state agent.⁴⁵⁸ Town agents must also keep strictly within the bounds of their authority in making sales. If the statute provides that their sales shall be made for cash, they cannot give credit, notwithstanding a local custom to give thirty days' time.⁴⁵⁹ If a town agent transcends his authority by making sales for forbidden purposes, or by buying and selling liquor as a matter of private speculation, he is liable to indictment and punishment, in the same manner as any other person, notwithstanding he is also liable to have his agency revoked, and to a suit upon his bond.⁴⁶⁰ Also, if the commissioner who appoints the agent enters into a contract with him, to furnish him with all the liquor he may purchase, at a profit, such agreement is void, being against the policy of the law.⁴⁶¹

⁴⁵³ State v. Weeks, 67 Me. 60.

⁴⁵⁴ Comm. v. Pillsbury, 12 Gray, 127. 149.

⁴⁵⁵ Atkins v. Randolph, 31 Vt. 226.

⁴⁵⁶ Foxcroft v. Crooker, 40 Me. 308.

⁴⁵⁷ Washington v. Eames, 6 Allen, 417.

⁴⁵⁸ Lauten v. Allenstown, 58 N. H. 289.

⁴⁵⁹ Mansfield v. Stoneham, 15 Gray, 149.

⁴⁶⁰ State v. Keen, 34 Me. 500; State v. Putnam, 38 Me. 296.

⁴⁶¹ Baldwin v. Coburn, 39 Vt. 441.

CHAPTER IX.

REGULATION OF SALES BY DRUGGISTS AND PHYSICIANS.

- § 206. Sale of Liquor by Druggists without License.
- 207. Druggists' Licenses and Bonds.
- 208. Druggists' Permits in Prohibition States.
- 209. Unlawful Sales by Licensed Druggists.
- 210. Question of Intention and Good Faith.
- 211. Sale on Prescription of Physician.
- 212. Druggists' Reports of Sales.
- 213. Sales by Druggists' Clerks.
- 214. Revocation of Druggist's License.
- 215. Sale of Liquor by Physicians.
- 216. Sales by Persons who are both Druggists and Physicians.

§ 206. Sale of Liquor by Druggists without License.

The right of druggists to sell intoxicating liquors, within the general scope of their proper business, without the protection afforded by a retailer's license, is a subject which has frequently engaged the attention of the courts, and especially in those states where the law makes no special provision for this class of sales, or does not provide for special permits for pharmacists. It then becomes a question whether the peculiar position of these persons, and the purpose for which they sell the prohibited articles, will exempt them from the general and comprehensive terms of the statute. Of course no druggist can be allowed to sell liquor for tippling purposes, unless he takes out a license and makes his place of business avowedly a dram-shop. But there are many authorities which hold that if a druggist sells spirituous liquors, upon a proper occasion, in good faith, and with due caution, (and especially under a physician's prescription,) to be used for medical purposes only, he is not to be regarded as having violated the law, although he holds no license to sell, and although the law does not explicitly except him from its terms. Such a sale may be contrary to the letter of the statute, when it prohibits *all* persons from selling without a license, but it is no violation of its spirit, nor

does it fall within the evils which the license laws are intended to remedy. And on this ground the courts will imply an exception in favor of sales made for such purposes and under such circumstances as those above supposed.¹ A similar construction is put upon the United States internal revenue laws. For it is held that an apothecary who in good faith uses spirituous liquors in the preparation of a medicine, to be used as such and not as a beverage, does not violate the statute, although he has not paid the special liquor-dealer's tax.² Where a town charter prohibits the sale of liquor within the town, but with a proviso that it shall not be so construed as to prevent druggists and physicians from selling liquor for medical or sacramental purposes, it is adjudged that these persons, selling for such uses, need not take out a license under the general law.³

Whether the prescription of a physician is necessary to protect the druggist, is perhaps not fully settled. Numerous authorities, either expressly or by implication, hold that the want of such prescription will not make the seller guilty, if he used due care and caution in ascertaining the purpose for which the liquor was wanted, and himself acted in entire good faith.⁴ But in some states, it is the rule that he is not justified in selling unless the article is prescribed as a medicine by a practising physician.⁵ On principle, this is no proper ground on which to determine his guilt or innocence. If the purchaser brings a written order from a medical man, this will no doubt relieve the druggist from some portion of the care and caution which he is in all cases bound to exercise. But the ultimate question is always as to the purpose for which the article is to be used and the good faith of the parties. And even if the sale was made under the direction and prescription of a physician, that is not enough, unless

¹ *Donnell v. State*, 2 Cart. (Ind.) 658; *Jakes v. State*, 42 Ind. 473; *Ball v. State*, 50 Ind. 595; *Hooper v. State*, 56 Ind. 153; *Elrod v. State*, 72 Ind. 292; *Nixon v. State*, 76 Ind. 524; *Comm. v. Porter*, 10 Phila. 217; *State v. Wray*, 72 N. Car. 253; *Hainline v. Comm.*, 13 Bush, 350; *State v. Mitchell*, 28 Mo. 562; *State v. Wells*, Id. 565; *State v. Robertson*, 24 Mo. App. 232.

² *United States v. Calhoun*, 39 Fed. Rep. 604.

³ *Jones v. State*, 68 Ala. 559.

⁴ *State v. Robertson*, 24 Mo. App. 232, *State v. Mitchell*, 28 Mo. 562; *Donnell v. State*, 2 Cart. (Ind.) 658; *Jakes v. State*, 42 Ind. 473; *Ball v. State*, 50 Ind. 595; *Hainline v. Comm.*, 13 Bush, 350.

⁵ *State v. Cox*, 23 W. Va. 797. See *infra*, § 211.

it is also shown that it was prescribed for medical purposes.⁶ And in any case, an unlicensed person, who is not a druggist, cannot lawfully retail liquor, even on a physician's prescription.⁷ It will be understood that we are not now concerned with the practice in those states where the statutes expressly provide for druggists' permits and require a prescription to justify a sale. These laws will be considered in a later section.

The general doctrine above stated, however, is not universally accepted. In several of the states it is held that, under a statute forbidding the sale of intoxicating liquors by any person without a license, and containing no express exception in favor of druggists, such persons cannot lawfully sell liquor, even as a medicine, and even on the prescription of a physician.⁸ And where the law provides, in effect, that any one selling liquor without a license shall be liable to a fine, it is held that a druggist selling without license is not exempt from the fine because it happened that there was no one authorized to issue licenses to druggists; the license is made a prerequisite to the right to sell; if he could not obtain it, he had no right to sell.⁹ So in Maine, it is held that the conviction of a physician, not appointed by the town an agent for the sale of spirituous liquors, who sold such liquors for the purpose of mixture with certain medicines, was right, although the medicines were purchased at the same time with the liquor.¹⁰ But in Massachusetts, it is said that the keeping of intoxicating liquors, without a license, only for the purpose of mixing them with other ingredients, according to the prescriptions of physicians, to be used as medicine, and of manufacturing such compounds as are commonly used by druggists for medicinal purposes, is not a violation of the statute.¹¹ In Tennessee, as the law now stands, it is not lawful

⁶ *People v. Safford*, 5 Denio, 112.

⁷ *State v. Dalton*, 101 N. Car. 680, 8 S. E. Rep. 154.

⁸ *Woods v. State*, 36 Ark. 36, 38 Am. Rep. 22; *Flower v. State*, 39 Ark. 209; *Chew v. State*, 43 Ark. 361; *State v. Gray*, (Conn.) 22 Atl. Rep. 675; *Wright v. People*, 101 Ill. 126; *State v. Bissell*, 67 Iowa, 616, 25 N. W. Rep. 831; *Salina v. Seitz*, 16 Kans. 143; *King v. State*, 66

Miss. 502, 6 South. Rep. 188; *Brown v. State*, 9 Nebr. 189, 2 N. W. Rep. 214; *Carl v. State*, 89 Ala. 93, 8 South. Rep. 156.

⁹ *Rosenham v. Comm.*, (Ky.) 2 S. W. Rep. 230.

¹⁰ *State v. Hall*, 39 Me. 107.

¹¹ *Comm. v. Ramsdell*, 130 Mass. 68. See, also, *Comm. v. Pierce*, 147 Mass. 161, 16 N. E. Rep. 705.

for a druggist to sell spirituous or vinous liquors without a license, for any purpose whatever, except wine for sacramental uses.¹²

§ 207. Druggists' Licenses and Bonds.

In some of the states, as already intimated, it is considered necessary for druggists, who propose to sell liquor, to take out a license, either under the general excise laws, or under the statutory provisions specially applicable to their case. Thus, under the Tennessee statute, a druggist who sells liquor is liable for a liquor-dealer's occupation tax, although he has paid a merchant's tax.¹³ But where an ordinance regulating the sale of liquor makes no mention of a written permit being required, none is necessary.¹⁴ As to whether a druggist comes within the scope of the laws requiring retail dealers to furnish bonds conditioned for a due observance of the liquor laws, the authorities are not in harmony. In Illinois the opinion prevails that no bond is required from such persons.¹⁵ And this rule seems to accord well with the meaning and purpose of the provisions in question. But in Missouri, it is held that druggists and physicians are not exempted from giving the statutory bond, although the law permits them to mix and adulterate liquors for medicinal and mechanical purposes.¹⁶ In other states the law requires all liquor-sellers to make oath that they will not adulterate their commodities. And this is held to apply to pharmacists, so that, without taking this oath, they cannot lawfully sell liquor, even upon a physician's prescription.¹⁷ In Kansas, a civil action may be maintained by the state for the breach of a druggist's bond, given under the laws providing against the illegal sale of intoxicating liquors, although no criminal prosecution or conviction has been had.¹⁸

¹² State v. Wharton, (Tenn.) 3 S. W. Rep. 490.

¹³ Druggist Cases, 85 Tenn. 449, 3 S. W. Rep. 490.

¹⁴ Moore v. People, 109 Ill. 499.

¹⁵ Moore v. People, 109 Ill. 499.

¹⁶ State v. Ferguson, 72 Mo. 297.

¹⁷ Newman v. State, 7 Lea, 617.

¹⁸ State v. Pierce, 26 Kans. 777.

§ 208. Druggists' Permits in Prohibition States.

In those states where total prohibition of the manufacture and sale of intoxicating liquors as a beverage is the rule, the right to sell such liquors for the excepted purposes—medical, mechanical, scientific, and sacramental—is exclusively reserved to those persons, usually druggists, who shall receive permits for that purpose from the proper authorities. The laws make provision for the careful selection of these persons, with reference to their being trustworthy, for the restriction of their sales to the authorized purposes, and for the supervision or control of their business by the authorities. Enactments of this character are held to be complete in themselves and to contain the whole system for the regulation of sales by druggists.¹⁹ And they take away the right of all persons who are not pharmacists to sell liquor for medical uses.²⁰ Under these laws, it is held that a druggist is not required to give a bond, in order to obtain a permit to sell, unless the act expressly so provides.²¹ But he is held strictly within the limits of his statutory powers. And he has, for example, no authority to give away liquor for any unlawful purpose.²² But he is entitled to keep on hand such an amount of liquors as may be necessary, not only for present use, but for a reasonable time in the future.²³ Where the statute provides a penalty if any person shall sell or suffer to be sold intoxicating liquors, in one of its sections, and another section provides a different penalty for pharmacists, it is held that the former section includes pharmacists violating the law, and that the latter section provides a cumulative penalty, but that neither section is for that reason unconstitutional.²⁴ However, a provision that nothing contained in the statute shall shield the druggist who abuses his trust from the utmost rigors of the law, does not require the highest possible penalty to be fixed on the conviction of a drug-

¹⁹ State v. Courtney, 73 Iowa, 619, 35 N. W. Rep. 685; State v. Douglas, 73 Iowa, 279, 34 N. W. Rep. 856.

²⁰ State v. Aulman, 76 Iowa, 624, 41 N. W. Rep. 379.

²¹ State v. Courtney, 73 Iowa, 619, 35 N. W. Rep. 685.

²² State v. Harris, 64 Iowa, 287, 20 N. W. Rep. 439.

²³ State v. Shank, 79 Iowa, 47, 44 N. W. Rep. 241.

²⁴ State v. Duggan, 15 R. I. 403, 6 Atl. Rep. 787.

gist.²⁵ Under a statute that druggists "may" sell intoxicating liquors, on proper application, such sale is discretionary with the druggist, and in refusing to make such a sale, he is not required to give a reason for his refusal; nor is he liable in an action for damages for such refusal.²⁶

§ 209. Unlawful Sales by Licensed Druggists.

Druggists holding licenses or permits under the statutes above described are amenable to the laws for any abuse of the privilege intrusted to them. Thus, a registered pharmacist, who is permitted to sell liquors "for the necessities of medicine," and who sells for other purposes, is guilty of maintaining a liquor nuisance.²⁷ So, where one holding a permit to sell for mechanical, medicinal, culinary, and sacramental purposes, sells beer by the keg, to be used in the manufacture of a beverage known as "I. M. Soda-Water," it is a violation of the permit.²⁸ And a druggist making an unlawful sale cannot defend on the ground that the buyer said that he wanted the liquor for medicinal purposes, when in fact it was not used, nor did the seller believe it was to be used, for such purposes.²⁹ So, under the laws of New Hampshire, authorizing all registered pharmacists to "keep spirituous liquors for compounding their medicines," they are not authorized to sell such liquor not compounded with medicine.³⁰ Nor are they authorized to sell to others to be compounded with medicines.³¹ And a pharmacist who has violated the provisions of the law, being indicted for having liquors in his possession, cannot protect himself by alleging that the liquor when seized was not in his actual possession.³² But on such an indictment, evidence that at the time of the seizure he had pending an application for a druggist's license, and that five days after the making of the complaint,

²⁵ *State v. Hoagland*, 77 Iowa, 135, 41 N. W. Rep. 595.

²⁶ *Treahey v. Holliday*, 43 Kans. 29, 22 Pac. Rep. 1004.

²⁷ *State v. Salts*, 77 Iowa, 193, 39 N. W. Rep. 167.

²⁸ *State v. Yager*, 72 Iowa, 421, 34 N. W. Rep. 188. But a regularly licensed

druggist may sell a glass of lager beer upon the prescription of a physician. *Harper v. State*, 3 Lea, 211.

²⁹ *McGuire v. State*, 37 Miss. 369.

³⁰ *State v. Shaw*, 58 N. H. 72.

³¹ *State v. Brown*, 60 N. H. 205.

³² *State v. Ward*, 75 Iowa, 637, 36 N. W. Rep. 765.

he was granted such license, is admissible to explain his possession of liquors at the time of the seizure.³³ The requirements imposed upon druggists by the statute, as to acts to be done after the sale, (reporting sales, etc.,) if not complied with, may expose them to penalties, but such omission will not render sales unlawful which, in antecedent particulars, were legal and proper.³⁴

§ 210. Question of Intention and Good Faith.

Druggists being authorized to sell liquor only for medical purposes, it is an offense against the laws if they make sales of intoxicants as a beverage or for tippling purposes. And when their dealings are made the subject of judicial investigation, and there is reason to suspect that the form or pretense of furnishing medicine has been used as a cloak to cover an illegal sale of alcoholic stimulants, the question is one of intention and good faith, and of due care and caution on the part of the seller. This question must be determined upon the facts of each particular case, with such light as can be derived from the general character and conduct of the defendant's business.³⁵ Thus, it is proper for the jury to consider the frequency of the sales to the witnesses, their appearance as men requiring intoxicating liquor for medicine, and whether the same was bought with or without a physician's prescription.³⁶ The burden of proof is on the defendant to show that the sale was lawfully made, under a statute requiring the purchaser to furnish a written certificate of the use for which the article is wanted.³⁷ And where the purchasers were minors or inebriates, it is said the unlawful intent may be presumed from the unlawful sales.³⁸ On this principle, an instruction to the jury in

³³ Comm. v. Wellington, 146 Mass. 566, 16 N. E. Rep. 446.

³⁴ State v. Von Haltzschuberr, 72 Iowa, 541, 34 N. W. Rep. 323.

³⁵ Holtendorf v. State, 89 Ind. 282. See, also, Haynie v. State, 32 Miss. 400; Brooks v. State, 65 Miss. 445, 4 South. Rep. 343; State v. Blair, 72 Iowa, 591, 34 N. W. Rep. 432; State v. Thompson, 74 Iowa, 119, 37 N. W. Rep. 104; State

v. Shank, 79 Iowa, 47, 44 N. W. Rep. 241; State v. Oeder, 80 Iowa, 72, 45 N. W. Rep. 543.

³⁶ State v. Huff, 76 Iowa, 200, 40 N. W. Rep. 720.

³⁷ Comm. v. Perry, 148 Mass. 160, 19 N. E. Rep. 212.

³⁸ State v. Thompson, 74 Iowa, 119, 37 N. W. Rep. 104.

the following terms has been held correct: "The fact that the defendant's place of business was a drug-store does not raise any presumption in his favor, and if the state has proven to your satisfaction that any single sale of spirituous liquors was made by the defendant, and the defendant has not then shown that such sale was justified under the privileges of a druggist, which he claims, then you should convict."³⁹ If, for instance, a druggist sells whisky to a stranger upon his mere statement that he wants it for medicine, this is not exercising that caution and circumspection which the law requires, and a finding that the liquor was sold as a beverage will be justified.⁴⁰ So in Iowa, under the statute, proof that persons drank liquor in a pharmacy raises the presumption that such liquor had been unlawfully given or sold to them by the proprietor thereof.⁴¹ Where the reports made by a pharmacist to the county auditor showed nearly three thousand sales, but the kinds and amounts of liquor sold did not appear, nor was it shown to whom the sales were made, except in a few instances, it was held that a verdict against him was warranted, although he testified that the sales were legal.⁴² Proof that the buyers were wholesale druggists is not sufficient evidence that a sale of liquor was "for medicinal purposes only."⁴³ But on the other hand, when the purchasers testify that they bought small quantities of liquor from the defendant in good faith, for what they supposed to be their actual need of it as medicine, and the druggist swears that he sold it in good faith, on the same supposition, after consultation with them as to their ailments, and there is nothing to raise a suspicion of an illegal course of business, the defendant should not be convicted.⁴⁴ Where the law requires a druggist to take, from those to whom he sells intoxicating liquors, written statements which he must file with the probate judge, these statements are not incompetent, in a prosecution against the drug-

³⁹ *Baeumel v. State*, (Fla.) 7 South. Rep. 371.

⁴⁰ *State v. Knowles*, 57 Iowa, 669, 11 N. W. Rep. 620; *State v. Blair*, 72 Iowa, 591, 34 N. W. Rep. 432.

⁴¹ *State v. Cloughly*, 73 Iowa, 626, 35 N. W. Rep. 652.

⁴² *State v. Cummins*, 76 Iowa, 133, 40 N. W. Rep. 124.

⁴³ *Mills v. Perkins*, 120 Mass. 41.

⁴⁴ *State v. Hoagland*, 77 Iowa, 135, 41 N. W. Rep. 595; *State v. Flusche*, 79 Iowa, 765, 44 N. W. Rep. 698.

gist, on the ground that to use them against him would be requiring him to criminate himself.⁴⁵

§ 211. Sale on Prescription of Physician.

In some of the states, the statutes prohibit druggists from selling liquor except on the prescription of a physician. Where this is the case, it is no defense to an indictment for illegal selling that the liquor was called for and sold for medical uses, unless there was a prescription as required.⁴⁶ And these statutes are commonly so construed as to require a separate prescription for each separate sale.⁴⁷ But it is said that a sale of the quantity authorized by a prescription, in portions, on three different occasions, instead of the whole quantity at once, depends for its validity on the circumstances of the particular case, and the *bona fides* of the sale for medicinal purposes is a question for the jury.⁴⁸ Under a statute which makes it unlawful for any person to sell liquor in any quantity, except that a regular practising physician may in good faith prescribe the same as a medicine to his patient, but with no express exception in favor of druggists, it is nevertheless held, in Kentucky, that it is lawful for a druggist to sell liquor upon a physician's prescription, to be used as a medicine.⁴⁹ And this seems a very just and reasonable construc-

⁴⁵State v. Elliott, (Kans.) 26 Pac. Rep. 55.

⁴⁶Barton v. State, 99 Ind. 89; State v. Hendrix, 98 Mo. 374, 11 S. W. Rep. 728.

⁴⁷Carrington v. Comm., 78 Ky. 83; Edwards v. State, 121 Ind. 450, 28 N. E. Rep. 277.

⁴⁸State v. May, (S. Car.) 11 S. E. Rep. 440.

⁴⁹Parker v. Comm., (Ky.) 12 S. W. Rep. 276; Comm. v. Reynolds, (Ky.) 12 S. W. Rep. 132. In the case last cited it was said: "It was intended, by the plain meaning of the act, that liquor should be furnished as a medicine under the prescription of the physician, and whether filled by the druggist or the physician is immaterial. The physician prescribes the medicine to be used, and

the druggist fills the prescription. Under the construction contended for by the commonwealth, the physician must not only prescribe the medicine, but must furnish it to the patient. If he had gone to the druggist and called for the whisky, the husband of the invalid woman paying for it, it could still be argued that it was a sale to the husband, and not the physician; that the physician must pay the druggist, and the patient pay the physician. The latter has the right to purchase it as a medicine, and when making a prescription, and requiring the patient to pay for the liquor, it is in effect its use by the physician. It comes within the legislative meaning, and the abuse of this right by physicians who act in bad

tion of the law, although an exactly opposite conclusion has been reached in Arkansas.⁵⁰ In regard to the form and contents of the prescription, it appears that a close conformity to the terms of the statute will be necessary. For example, where the prescription is required to be given by a "regularly registered and practising physician," a prescription not shown to be such is inadmissible on the trial of a druggist for unlawful selling.⁵¹ So where the act declares that the prescription must specify that the liquor is absolutely necessary as a medicine, a prescription which omits the word "absolutely" is insufficient.⁵² But under a requirement that the prescription shall be signed and dated, a prescription dated by numerals only ("12, 16, 84,") and signed with the initials of the physician, has been held to protect the druggist.⁵³ An ordinance providing that "it shall be unlawful for any physician to give a prescription to any well person or persons, who is or are in apparently good health, to enable him or them to get any of said liquor to be used as a beverage," is held to be neither unreasonable, unauthorized, oppressive, nor unjustly discriminating against any class of the community.⁵⁴

§ 212. Druggists' Reports of Sales.

In some of the states, where druggists are invested with the exclusive right to sell liquors for medical and similar uses, the statutes require them to keep an account of their sales, and to make periodical reports of the same, in writing, to be filed among the public records of the county.⁵⁵ These reports, it is held, must cover all the

faith, and aid in evading the law, affords no argument for imposing the penalty in a case like this." Pryor, J.

⁵⁰ *Battle v. State*, 51 Ark. 97, 10 S. W. Rep. 12.

⁵¹ *State v. Millikan*, 24 Mo. App. 462.

⁵² *State v. Tetrick*, (W. Va.) 11 S. E. Rep. 1002.

⁵³ *State v. Clevenger*, 25 Mo. App. 653.

⁵⁴ *Carthage v. Buckner*, 4 Ill. App. 317.

⁵⁵ In Illinois, a city ordinance requir-

ing druggists, under a heavy penalty, to furnish to the city clerk a statement in writing of the kind and quantity of their sales of liquor, and when and to whom sold, verified by the oath of every servant in the druggist's employ, was held to be an invasion of the sanctity of private business, and to contravene the constitutional guaranty against unreasonable searches. *Clinton v. Phillips*, 58 Ill. 102. But the Iowa statute does not appear to have been successfully assailed on constitutional grounds.

sales made, including sales on prescription.⁵⁶ And where the imposition of a fine is made the consequence of a want of truth in the report, the fact that the report was false only through error and mistake is no defense.⁵⁷ Yet the omission or falsity of the report, while it will have the effect to make the druggist liable for the penalties directly imposed therefor, will not operate retrospectively to render his previous sales unlawful, or expose him to the punishment for illegal selling.⁵⁸ These reports, when filed as provided, become public records, and as such are admissible in evidence against any and all persons affected by the facts they disclose. Hence their introduction before a grand jury, for the purpose of obtaining an indictment against a pharmacist for illegal sales, is proper, and is not compelling him to testify against himself.⁵⁹ And such report may be admitted in evidence against him without proving the genuineness of his signature thereto.⁶⁰ In Iowa, the statute originally required the druggist's return of sales to be made "on the last Saturday of each month." It was held that this was not mandatory as to the exact time of making the return, and that it was sufficient if the return was made within the month.⁶¹ But after this decision, the statute was amended, so as to require the return to be made "on the last Saturday of each month or within five days thereafter," and, as it now stands, it is held that the requirement is mandatory and not directory.⁶²

§ 213. Sales by Druggists' Clerks.

The license or permit of a druggist, so far as it goes, is a full protection to his clerk or servant, when acting within the scope of the privileges which it confers upon the master.⁶³ But a druggist's permit will not authorize his clerk to sell at any other place than the

⁵⁶ State v. Chamberlin, 74 Iowa, 266, 37 N. W. Rep. 326.

⁵⁷ State v. Chamberlin, 74 Iowa, 266, 37 N. W. Rep. 326.

⁵⁸ State v. Von Haltzschuherr, 72 Iowa, 541, 34 N. W. Rep. 323.

⁵⁹ State v. Smith, 74 Iowa, 580, 38 N. W. Rep. 492; State v. Cummins, 76 Iowa, 133, 40 N. W. Rep. 124.

⁶⁰ State v. Thompson, 74 Iowa, 119, 37 N. W. Rep. 104.

⁶¹ Abbott v. Sartori, 57 Iowa, 656, 11 N. W. Rep. 626.

⁶² State v. McEntee, 68 Iowa, 381, 27 N. W. Rep. 265.

⁶³ State v. Mullenhoff, 74 Iowa, 271, 37 N. W. Rep. 329.

drug-store.⁶⁴ And the license of a druggist cannot be evidence of a right in his clerk to sell liquor for other than medicinal purposes, when it does not show any authority given to the employer to sell such liquors for any purpose other than medicinal.⁶⁵

§ 214. Revocation of Druggist's License.

Under the statutes for the regulation of the practice of pharmacy, it is held that a druggist's license may be revoked for a single unlawful sale of intoxicating liquor. And where a person's certificate as a pharmacist was revoked, and his name stricken from the register, by the commissioners of pharmacy, upon the record proof of his conviction by a competent tribunal of the unlawful sale of liquor, it was held that he could not complain that he was deprived of his property without due process of law.⁶⁶

§ 215. Sale of Liquor by Physicians.

It has been held that where a physician administers liquor as a medicine, upon his professional judgment of its necessity, he is not therefor amenable to the laws prohibiting the sale of intoxicants.⁶⁷ But in some states, the statutes, not expressly excepting medical men, are so construed that a physician cannot lawfully furnish such liquor to a patient, even though he acts in entire good faith and considers it an appropriate and necessary remedy.⁶⁸ And in Kansas and Iowa, where permits to sell liquor may be granted to druggists only, and all other persons are forbidden to sell, it is the rule that a physician, unless he holds such a permit, may not sell liquor as medicine to a patient or dispense it in putting up his own prescriptions.⁶⁹ Most of the statutes, however, contain such expressions or implications as will authorize medical men, in the practice of their profession, to make such use of alcoholic liquors as may be justified by

⁶⁴ State v. Copp, 34 Kans. 522, 9 Pac. Rep. 233.

⁶⁵ Provo City v. Shurtliff, 4 Utah, 15, 5 Pac. Rep. 302.

⁶⁶ Hildreth v. Crawford, 65 Iowa, 339, 21 N. W. Rep. 667.

⁶⁷ State v. Larrimore, 19 Mo. 391.

⁶⁸ Carson v. State, 69 Ala. 235; Thomson v. State, 70 Ala. 20.

⁶⁹ State v. Fleming, 32 Kans. 588, 5 Pac. Rep. 19; State v. Benadone, 79 Iowa, 90, 44 N. W. Rep. 218.

their medicinal value and the exigencies of the cases they are called upon to treat. But it is proper for the state to make suitable provision against the abuses that are to be apprehended from unscrupulous practitioners. And hence a law which casts upon the physician the burden of proving that the patient actually needed the liquor as a medicine is not unconstitutional.⁷⁰ And these privileged persons are required to act with the utmost integrity, and without any intention to evade the law, and to be professionally convinced of the necessity or expediency of prescribing such articles for the particular patient. Thus, when a physician sells liquor to persons who apply to him for it, on their own suggestion and request, and not because of his prescription as their medical adviser, the fact that he is a practising physician is no defense to a prosecution for illegally selling intoxicating liquors.⁷¹ And the mere fact that he knew the purchaser's wife was sick would not show that the sale was made for medicinal purposes.⁷² Where a physician is on trial for giving a prescription for liquor to one not a *bona fide* patient, under a statute in that behalf, evidence of the number of prescriptions for liquor given by him to various persons within a specified time, is competent, since it tends to show whether he gave the prescriptions in good faith or merely to evade the law.⁷³ Under the statute in Kentucky, it is required that the patient shall be actually sick, and that the physician, after making reasonable investigation, shall believe in good faith that his patient needs the liquor as a medicine, before he prescribes it.⁷⁴ Under a statute permitting physicians to administer spirituous liquors in cases of absolute necessity, a physician cannot lawfully prescribe a quart of whisky, and give the patient an order for it on a drug-store in which he is interested as a partner.⁷⁵

⁷⁰ Comm. v. Minor, 88 Ky. 422, 11 S. W. Rep. 472.

⁷¹ State v. Cloughly, 73 Iowa, 626, 35 N. W. Rep. 652.

⁷² Thomason v. State, 70 Ala. 20.

⁷³ State v. Atkinson, (S. Car.) 11 S. E. Rep. 693.

⁷⁴ Comm. v. Minor, 88 Ky. 422, 11 S. W. Rep. 472.

⁷⁵ Brinson v. State, (Ala.) 8 South.

Rep. 527. In this case it was said: "The statute clearly contemplates the *bona fide* administering of such liquors as a medicine in cases of necessity, not otherwise. We are all of opinion that the giving by a physician of an order for a quart of whisky, on a drug-store in which he himself was a partner, without more, is not the administering of medicine within the meaning of this

§ 216. Sales by Persons who are both Druggists and Physicians.

In Texas, it is held that a druggist, who is also a regular practising physician, may prescribe and sell intoxicating liquor, notwithstanding the prevalence of the local option law in the district.⁷⁶ But in other states, where a druggist is authorized to sell only on the prescription of some regularly registered physician, it is ruled that a druggist, who is himself a duly qualified physician, cannot lawfully sell on his own prescription.⁷⁷ The clerk of a physician who keeps a drug-store is rightly convicted for selling liquor, even upon a physician's order and for medical purposes, if he had no license to retail, although his master had a physician's license.⁷⁸

law, but an illegal sale of spirituous liquors, contrary to the terms of the statute."

⁷⁶ Boone v. State, 10 Tex. App. 418, 38 Am. Rep. 641.

⁷⁷ State v. Anderson, 81 Mo. 78; Tilford v. State, 109 Ind. 359, 10 N. E. Rep. 107.

⁷⁸ Gault v. State, 34 Ga. 533.

CHAPTER X.

REGULATION OF LIQUOR TRAFFIC BY MUNICIPAL CORPORATIONS.

- § 217. Delegation of Regulative Power to Municipalities.
- 218. Limits of Legislative Power in This Regard.
- 219. Uniformity in Grant of Power not Required.
- 220. Extent of Power Delegated.
- 221. Ordinances Partially in Excess of Power.
- 222. Conflict of Ordinance with Constitution.
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- 224. Repeal of Ordinance by Subsequent Statute.
- 225. Co-Ordinate Authority of State and Municipality.
- 226. Grant of Exclusive Power to Municipality.
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- 228. Power Granted to Municipality cannot be Delegated.
- 229. Power of Municipality to Require Licenses.
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- 232. Differential and Discriminating Rates.
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- 234. Ordinances Regulating Sale of Liquor.
- 235. Ordinance Prohibiting Sale on Sunday.
- 236. Prescribing Hours of Closing Saloons.
- 237. Prohibiting Employment of Women in Saloons.

§ 217. Delegation of Regulative Power to Municipalities.

In the absence of specific constitutional restrictions, it is competent for the legislature of a state, by a general incorporation law or by a particular charter, to empower a municipality to make ordinances, operative within its limits, for the regulation or licensing of the traffic in intoxicating liquors, although the subject may already be provided for by the general laws of the state. And a municipal charter or its by-laws may thus, either expressly or by necessary implication, supersede the general laws on the subject, within the limits of the corporation.¹ It is entirely in accordance with the principle of local

¹Davis v. State, 2 Tex. App. 425; Bush, 406; St. Paul v. Troyer, 3 Minn. Comm. v. Fredericks, 119 Mass. 199; 291, (Gil. 200;) Moundsville v. Fountain, State v. Harper, 42 La. Ann. 312, 7 27 W. Va. 182. South. Rep. 446; Mason v. Trustees, 4

self-government, so thoroughly recognized in our political systems, that the power to enact police regulations, on a matter so closely connected with the good order and prosperity of a city, should be lodged with those best qualified to judge of the measures adapted to meet the exigencies of their particular situation. To refer this power to the cities and towns is indeed a delegation of legislative power. But municipal corporations are subordinate agencies of government, political in their character and purpose, and organized as a part of the governmental framework of the state. Hence, within proper limits, it is competent for the legislature to invest them with the authority necessary to the administration of the special purposes of their creation. As to any inconsistency between the grant of power in a municipal charter and the general law of the state previously in force, it must be remembered that the incorporation of a municipality is an act of legislation, as much so as the passing of a statute on any other subject. And hence the law conferring such power upon the municipality must be regarded only as a more recent and competent expression of the legislative will.² Even where the constitution expressly forbids the legislature to authorize a municipal corporation to pass a law inconsistent with the general laws of the state, it is held that a statute is valid which empowers a municipality to entirely prohibit the liquor traffic, although it is not absolutely prohibited by the general law in force in the state.³ And such entire prohibition, by municipal ordinance, so long as the special power is not inhibited or revoked, is not to be regarded as contrary to public policy.⁴ It is further to be remarked that as municipal corporations are always under the direct control of the legislature, that body may at any time take away the powers which it has granted to them. Thus, it may repeal all laws giving authority to a municipality to grant licenses for the sale of liquor, although those laws had appropriated the money derived from license fees to some specific municipal purpose.⁵

² State v. King, 37 Iowa, 462.

⁴ Gunnarssohn v. Sterling, 92 Ill. 569.

³ *Ex parte Cowert*, (Ala.) 9 South. Rep.

⁵ Gutzweiler v. People, 14 Ill. 142.

§ 218. Limits of Legislative Power in This Regard.

In delegating to municipal corporations the power to regulate the liquor traffic, the legislature must of course act in accordance with the express terms of the constitution. For instance, where total prohibition is incorporated in the organic law of the state, the legislative body cannot authorize municipalities to grant licenses. So, if the constitution inviolably devotes the moneys derived from license fees to the school funds, any city charter or other enactment attempting to divert these revenues to any other object is void.⁶ So, if the legislature is forbidden to pass any act "regulating the internal affairs of cities," the power may be conferred upon the municipality, but the machinery for its exercise cannot be prescribed.⁷ Yet a general act, for the establishment of an excise department in the cities of the state, is held to be a grant of original power to a municipal department the creation of which is intrusted to the municipality itself, and not a delegation of power to the municipality, to be by it passed over to a body of its own creation.⁸ Again, as a rule, the legislature cannot confer upon a municipality a power which is to be exercised beyond its own territorial limits. But a grant of authority to exact a fee from any person retailing liquor within a distance of one or two miles from the city, is held to be a police regulation, having reference to the peace and good order of the local community, and therefore not unconstitutional.⁹

§ 219. Uniformity in Grant of Power not Required.

It is no objection to the delegation to municipal corporations of the power to regulate the liquor traffic that it may result in the prevalence of different systems or policies in different parts of the state. The municipal corporations of a state are quite generally divided into classes, according to their population or their mode of organization,

⁶ *Yazoo City v. State*, 48 Miss. 440.

⁹ *Falmouth v. Watson*, 5 Bush. 660;

⁷ *State v. Camden*, 40 N. J. Law, 156.

Lutz v. Crawfordsville, 109 Ind. 466, 10

⁸ *State v. City of Trenton*, 51 N. J. N. E. Rep. 411.

Law, 498, 18 Atl. Rep. 116.

and it is well settled that any law which equally affects all the towns or cities in a particular class is "uniform" in the constitutional sense. And when the subject-matter is one of police, it may well happen that a different principle of classification than that by population will be proper. For example, in Ohio, it is held that a statute which authorizes incorporated villages having within their limits a college or university to provide against the evils resulting from the sale of intoxicating liquors therein, is valid and constitutional, inasmuch as the classification of municipal corporations thereby established is just and reasonable.¹⁰

§ 220. Extent of Power Delegated.

The legislative body of a municipal corporation is a body possessing defined and limited powers. When the validity of any of its acts is in question, its authority must be sought in the municipal charter, or in the general act under which the incorporation was had, or in the general statutes defining the powers of municipalities. "It is a general and undisputed proposition of law," says Judge Dillon, "that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable."¹¹ Hence it follows that towns and cities have no power to adopt ordinances for the prohibition or regulation of the sale of liquor, unless expressly authorized thereto, or unless such ordinances fairly and legitimately fall within the scope of the powers conferred upon them in general terms.¹² Thus, authority to "license saloons, taverns, and eating-houses," by municipal ordinance, does not embrace the sale of liquor.¹³ So, an ordinance prohibiting such sale within three miles

¹⁰ *Bronson v. Oberlin*, 41 Ohio St. 476, 52 Am. Rep. 90. See, also, *Burckholter v. McConnellsville*, 20 Ohio St. 308.

¹¹ 1 Dillon, *Munic. Corp.* § 89.

¹² *Carr v. Fowler*, 74 Ind. 590; *State v. Brittain*, 89 N. Car. 574; *Sanders v.*

Town Comm'rs, 30 Ga. 679; *Comm. v. Voorhies*, 12 B. Mon. 361; *Salt Lake City v. Wagner*, 2 Utah, 400.

¹³ *Mount Pleasant v. Vansice*, 43 Mich. 361, 5 N. W. Rep. 378, 38 Am. Rep. 193.

of the corporate limits is void, unless specially authorized by the legislature.¹⁴ And where the general law empowers cities to "regulate or prohibit the sale of intoxicating liquors," a city cannot pass an ordinance authorizing the forfeiture or destruction of liquors kept for sale in violation of its ordinance.¹⁵ So where the charter empowers the council to declare the keeping of liquor on hand for sale to be a nuisance, this does not carry with it the power to make it an offense for any person to have in his possession any intoxicating liquors.¹⁶

But on the other hand, the powers of a municipality, in this regard, will often be aided by proper implications from the general terms employed by the legislature, or by a consideration of the spirit and purpose of the statute. In illustration of this principle, where the law authorizes municipal corporations to exact licenses from persons licensed by state or county authority to sell liquor within the corporate limits, a city is not restricted to exacting licenses from those who have taken out state or county licenses, but its power extends to all persons pursuing the business; the intention of the law was not to exempt from payment of a city license persons violating the law by selling without a state or county license.¹⁷ And so the grant of power, in issuing licenses, to impose upon the applicant the oath required by the general laws of the state, impliedly gives the power to require the clerk of the applicant to take a similar oath.¹⁸ Similarly, where the charter of a town authorizes it to enact ordinances "for the preservation of good order, decency, and decorum within its limits," and the sale of intoxicating liquors is prohibited within the county (excluding the town) as opposed to good order, decency, and decorum, an ordinance forbidding the sale of such liquor within the town, and prescribing a penalty for its violation, is valid.¹⁹ But a charter granting regulative or prohibitive power supposes that the usual means by penalty will be resorted to. The passage of an ordinance merely declaring that liquor shall not be sold,

¹⁴ *Strauss v. Pontiac*, 40 Ill. 301.

¹⁵ *Ilenke v. McCord*, 55 Iowa, 378, 7 N. W. Rep. 623.

¹⁶ *Sullivan v. City of Oneida*, 61 Ill. 242.

¹⁷ *Lutz v. Crawfordsville*, 109 Ind. 466, 10 N. E. Rep. 411.

¹⁸ *Floyd v. Comm'rs of Eatonton*, 14 Ga. 354.

¹⁹ *Fortner v. Duncan*, (Ky.) 15 S. W. Rep. 55.

without imposing any penalty for its violation, is not within the spirit of the charter.²⁰

§ 221. Ordinances Partially in Excess of Power.

Even if a city ordinance, prohibiting sales of intoxicating liquors, embraces a class of sales which the city has no power to prohibit, it may still be enforced as to such sales as fall within the scope of its authority.²¹ Thus, where the ordinance forbids the sale of malt and vinous liquors, which the city may lawfully do, but also prohibits the sale of spirituous liquors, which is beyond its authority, that subject being provided for by the state law, the ordinance may be enforced as to the former prohibition, although invalid as to the latter.²² So, an ordinance prohibiting generally the sale of liquor, although, for want of legislative authority, it may be void as to druggists, is not for that reason void as to other persons, if the city has authority to forbid sales by them.²³ Again, where the law of the state allows the sale of liquors in quantities of five gallons and upwards without license, an ordinance prohibiting the sale of liquor in the city without license, not specifying any quantities, is valid as to sales in less quantities than five gallons.²⁴

§ 222. Conflict of Ordinance with Constitution.

The legislature cannot confer, nor can any municipal corporation claim, the power to pass an ordinance inconsistent with the constitution of the state. Thus, if the constitution itself contains a prohibition against the manufacture and sale of intoxicating liquors, no city can lawfully license or authorize the sale of such liquors, and from the exercise of such a power it may be ousted by proceedings in the nature of *quo warranto*.²⁵ And an ordinance of that character,

²⁰ *Pekin v. Smelzel*, 21 Ill. 464.

²¹ *Harbaugh v. Monmouth*, 74 Ill. 367; *Wagner v. Town of Garrett*, 118 Ind. 114, 20 N. E. Rep. 706.

²² *Eldora v. Burlingame*, 62 Iowa, 32, 17 N. W. Rep. 148; *Cantril v. Sainer*, 59 Iowa, 26, 12 N. W. Rep. 753.

²³ *Ex parte Cowert*, (Ala.) 9 South. Rep. 225.

²⁴ *State v. Priester*, 43 Minn. 373, 45 N. W. Rep. 712.

²⁵ *State v. City of Topeka*, 30 Kans. 653, 2 Pac. Rep. 587; *s. c.*, 31 Kans. 452, 2 Pac. Rep. 597. A city may, in effect,

originally void as in contravention of the constitution, is not made valid by the repeal of the constitutional prohibition.²⁶ Nor does the removal of the constitutional prohibition, of itself, authorize a town council to license drinking saloons under a municipal charter granted before the constitutional amendment.²⁷ It is also necessary that ordinances should conform to the constitutional guaranties of due process of law and protection to private rights. Thus, an ordinance which authorizes the town authorities to close a drinking-saloon by force, without having it first judicially declared a nuisance and ordered to be abated, is invalid.²⁸ But ordinances, like acts of the legislature, regulating or prohibiting the traffic in intoxicants, cannot properly be said to deprive any person of his liberty or property illegally, merely because they impose restrictions on the pursuit of this business, or altogether withhold the privilege of engaging in it.²⁹ And if an ordinance prohibits the sale of intoxicating liquors on Sunday, it is not to be held in conflict with the constitutional provisions for freedom in matters of religion.³⁰

§ 223. Conflict of Ordinance with General Law.

The powers conferred upon a municipal corporation must be exercised in conformity to the general law of the state, unless it is clear that the exclusive control of the subject is given to the municipality, or that the general law is to be superseded or suspended by the charter. A statute granting authority to a city to pass ordinances in relation to the liquor traffic does not repeal the general laws on that subject.³¹ The rule is, that the municipal ordinances cannot set aside, limit, or enlarge the statute law of the state, unless its power

authorize the sale of liquor, contrary to the prohibition of the constitution, by the action of its officers, so as to render it liable to proceedings against it to oust it from the exercise of such usurped powers, although not doing so directly by granting written or printed licenses. *State v. Leavenworth*, 36 Kans. 314, 13 Pac. Rep. 591.

²⁶ *Mount Pleasant v. Vansice*, 43 Mich.

361, 5 N. W. Rep. 373, 38 Am. Rep. 193.

²⁷ *Dewar v. People*, 40 Mich. 401, 29 Am. Rep. 545.

²⁸ *Baldwin v. Smith*, 82 Ill. 162.

²⁹ *Tanner v. Alliance*, 29 Fed. Rep. 196; *Markle v. Akron*, 14 Ohio, 586; *supra*, §§ 37, 45, 127, 128.

³⁰ *Gabel v. Houston*, 29 Tex. 335.

³¹ *Gardner v. People*, 20 Ill. 430; *State*

to do so can be shown in express terms or by necessary implication. Illustrations of this principle are numerous in the books. Thus, unless specially authorized, a city has no power to punish for selling liquors the sale of which is already prohibited by state law,³² nor to impose, as a condition on the grant of licenses to sell the species of liquors over which it has control, that the others shall not be sold on the premises nor gambling permitted.³³ And if the statute excepts certain liquors from its provisions, (as, domestic wine, beer, cider, etc.,) an ordinance which would render the exception nugatory, is invalid.³⁴ So where the general law permits the sale of liquor in quantities above a certain measure, the ordinance cannot increase the minimum.³⁵ Under a grant of power to "regulate and license" taverns, and to "preserve peace and good order, and prevent vice and immorality," a city cannot prohibit the sale of liquor on Sunday, when the legislature has prohibited such sale generally.³⁶ And if authorized to increase the price of licenses, the city cannot enact a penalty for selling without license, when the statute has already provided a penalty less in amount, for the same offense.³⁷ Even where the city has the exclusive right to grant licenses, the power must be exercised in accordance with the requirements of the general law; and if that law requires the application to be supported by the petition of a majority of the legal voters, this requisite cannot be dispensed with.³⁸ In Missouri, it is also held that a city ordinance cannot abridge the rights of one holding a license issued previous to its adoption, as he has a vested right in the privilege until the expiration of the period for which his license runs.³⁹ But on the other hand, if supported by a sufficient grant of power, municipal corporations may make more detailed or more stringent regulations, on the subject of the sale of intoxicants, than those imposed by the general

v. Witter, 107 N. Car. 792, 12 S. E. Rep. 328.

³² Foster v. Brown, 55 Iowa, 686, 8 N. W. Rep. 654.

³³ New Hampton v. Conroy, 56 Iowa, 498, 9 N. W. Rep. 417.

³⁴ Thompson v. Mt. Vernon, 11 Ohio St. 688.

³⁵ Adams v. Albany, 29 Ga. 56. But compare Byers v. Olney, 16 Ill. 35.

³⁶ Loeb v. Attica, 82 Ind. 175, 42 Am. Rep. 494.

³⁷ Schroder v. City Council, 2 Treadw. Const. 726.

³⁸ House v. State, 41 Miss. 737.

³⁹ Hannibal v. Guyott, 18 Mo. 515. But see, *supra*, §§ 127, 128.

laws of the state.⁴⁰ And an ordinance, though following a line parallel to that of the statute, will be sustained as valid, provided only that there is no necessary inconsistency between the two.⁴¹ Where a law, to become operative at a future day, fixes the price of liquor licenses at not less than a certain sum, a city may so change its ordinances as to provide for the issue of licenses before that day for a less sum. It cannot be contended that the action of the city is void because intended to evade the law, even though such was the intention.⁴²

§ 224. Repeal of Ordinance by Subsequent Statute.

Whenever a change of policy takes place in the state on the subject of its liquor legislation, by the adoption of a different system,—as when general prohibition, or prohibition for particular localities, is enacted by a constitutional amendment or general statute, or when the legislature provides a uniform and general system for the licensing of the traffic,—this has the effect to repeal all inconsistent provisions in municipal charters and the ordinances adopted under them.⁴³ Thus, when the provisions of a local option law are adopted by popular vote in a county, a city in said county, previously invested with full and exclusive power to regulate the sale of intoxicating liquors, is thereby divested of all authority to make ordinances regulating or legalizing such sale.⁴⁴ But in a case in Connecticut, where it appeared that a city by-law forbade the keeping open of liquor-saloons after half-past ten o'clock in the evening, and afterwards a state law prohibited the keeping open of such places after midnight, and repealed all laws inconsistent with it, it was held that the city ordinance was superseded by the state law only in its application to persons licensed under the latter, and that, in a prosecution under the ordinance, it must be shown affirmatively in defense that defendant was so licensed.⁴⁵

⁴⁰ *Pekin v. Smelzel*, 21 Ill. 464.

⁴¹ *Mayson v. Atlanta*, 77 Ga. 662.

⁴² *Swarth v. People*, 109 Ill. 621.

⁴³ *Platteville v. McKernan*, 54 Wis. 487, 11 N. W. Rep. 798. See *Town of Ottawa v. County of La Salle*, 12 Ill.

330; *Adams v. Stephens*, 88 Ky. 443, 11 S. W. Rep. 427.

⁴⁴ *Turner v. City of Forsyth*, 78 Ga. 638, 3 S. E. Rep. 649.

⁴⁵ *State v. Brady*, 41 Conn. 588.

§ 225. Co-Ordinate Authority of State and Municipality.

A municipal ordinance and a state statute, relating to the sale of liquor, may both stand as operative enactments, although they cover the same ground, define the same or similar offenses, or make similar regulations as to the conduct of the business, provided that the municipality is fully authorized to take such action, and that there is no irreconcilable repugnancy between the two enactments.⁴⁶ Thus, in the absence of any expression, in a municipal charter, clearly indicative of an intention to confer upon the municipality the *exclusive* power to fine persons selling liquor without license, such persons may be punished under the general law of the state, though the measure of punishment and the mode of effecting it may be different. But in such a case, a fine assessed by either jurisdiction would be a bar to a prosecution for the same offense by the other jurisdiction.⁴⁷ So a municipal ordinance prohibiting the sale of liquor as a beverage is not inconsistent with a statute prohibiting such sale without a license, and a prosecution may be had under either or both of such laws.⁴⁸ And so if the statute and the ordinance are both intended to prevent the sale of liquor on Sunday, or the keeping open of drinking-places on that day, both may be enforced. If they cover the same ground exactly, the penalties prescribed may be regarded as cumulative. If they relate to different hours of the day, or to different acts of the defendant, (as, "selling" and "keeping open,") they may be considered as creating distinct offenses, each punishable under the appropriate enactment.⁴⁹ And the imposition of a state tax upon the sale of liquor does not preclude the state from authorizing an additional imposition of a municipal tax.⁵⁰

⁴⁶ *Bailey v. State*, (Nebr.) 47 N. W. Rep. 208. See, also, *State v. Francis*, 95 Mo. 44, 8 S. W. Rep. 1; *State v. Langdon*, 29 Minn. 393, 13 N. W. Rep. 187.

⁴⁷ *Wightman v. State*, 10 Ohio, 452.

⁴⁸ *Hill v. Dalton*, 72 Ga. 314; *State v. Langdon*, 31 Minn. 316, 17 N. W. Rep. 859; *Ambrose v. State*, 6 Ind. 351.

⁴⁹ *Village of Cohoes v. Moran*, 25 How. Pr. 385; *Thon v. Comm.*, 31 Gratt. 887; *Angerhoffer v. State*, 15 Tex. App. 613; *Craddock v. State*, 18 Tex. App. 567.

⁵⁰ *Wolf v. Lansing*, 53 Mich. 367, 19 N. W. Rep. 83.

§ 226. Grant of Exclusive Power to Municipality.

In some of the states, the legislative policy has been to confide the regulation or prohibition of the sale of liquor exclusively to the authorities of the municipal corporations. The grant of such power, while undoubtedly valid, is not to be presumed. Nothing short of an explicit declaration of the legislative will in that behalf will suffice to endow the municipalities with entire control over the subject, to the exclusion of all other authorities.⁵¹ But where such power has been given, it will suspend or supersede all extraneous right to interfere in the management of the particular subject. Thus, if the legislature has declared that incorporated towns shall have the exclusive privilege of granting licenses, the county authorities have no power or right to interfere, in any manner whatever, with the subject; and the refusal of a town to grant any licenses does not confer power upon the county authorities to issue them.⁵² Further, the exercise by a municipality of such exclusive power granted to it will have the effect to supersede or suspend the general law of the state on the same subject-matter. So that a person who brings himself within the law, by fully complying with all the regulations adopted by the municipal corporation, is not amenable to the general law, nor punishable for acts which, without the protection afforded by the ordinance, would be violations of the statute.⁵³ This principle is well illustrated by the case of *Huffsmith v. People*.⁵⁴ It there appeared that a statute had been enacted prohibiting the keeping open of tippling-houses on Sunday. Subsequently, a city charter was granted, conferring upon the city "exclusive power to license, tax, restrain, prohibit, and suppress tippling-houses" in the city. The city enacted an ordinance prohibiting the keeping open of any place for the sale of intoxicating

⁵¹ *Territory v. Webster*, 5 Dak. 351, 40 N. W. Rep. 535; *Licks v. State*, 42 Miss. 316.

⁵² *Coulterville v. Gillen*, 72 Ill. 599; *Trustees of Clintonville v. Keeting*, 4 Denio, 341; *Phillips v. Tecumseh*, 5 Nebr. 812.

⁵³ *Camp v. State*, 27 Ala. 53; Comm.

v. Luck, 2 B. Mon. 296; *Bennett v. People*, 30 Ill. 389; *Hetzer v. People*, 4 Colo. 45; *State v. Wheeler*, 27 Minn. 76, 6 N. W. Rep. 423; *State v. Nolan*, 37 Minn. 16, 33 N. W. Rep. 36.

⁵⁴ 8 Colo. 175, 6 Pac. Rep. 157, 54 Am. Rep. 550.

liquors "between midnight and five o'clock A. M. of the day following." The defendant was convicted under the statute of keeping open a tippling-house on Sunday in that city. It was held that the conviction could not be sustained, because the general statute was superseded as to that city. Exclusive power of this character, granted to a city by its charter or a general act, is to be exercised by the enactment of ordinances. Until this is done the subject remains without regulation. For example, if the city has exclusive power to provide for the granting of licenses, no one can lawfully engage in the traffic, within its limits, until this power is exercised by ordinance. For until that time, no application can be made, and no other steps taken towards the procurement of a license.⁵⁵

§ 227. Power to Regulate does not Include Power to Prohibit.

The difference between "regulation" and "prohibition" is clear and well marked. The former contemplates the continuance of the subject-matter in existence or in activity; the latter implies its entire destruction or cessation. The extent of the power granted to a municipal corporation is to be determined by an examination of the words of the charter or statute embodying the grant of authority. Combining these two principles, we deduce the rule that if a municipality is expressly empowered to "regulate" the sale of liquor within its limits, or to "license" or "tax" the traffic, this does not include the power to pass ordinances entirely prohibiting such sale or traffic. And this is the conclusion which all the authorities have reached.⁵⁶ But true regulation of the sale of intoxicants is not inconsistent with a partial or qualified prohibition.⁵⁷ And hence, under a power to "restrain intoxication and provide for the good order of the city," the sale of liquor on particular days or at particular places may be

⁵⁵ State v. Andrews, 11 Nebr. 523, 10 N. W. Rep. 410.

⁵⁶ Sweet v. Wabash, 41 Ind. 7; Hill v. Comm'rs, 23 Ga. 203; *Ex parte Reynolds*, 87 Ala. 138, 6 South. Rep. 335; *Ex parte City of Anniston*, (Ala.) 7

South. Rep. 779; Tuck v. Town of Waldron, 31 Ark. 462; State v. Harper, 42 La. Ann. 312, 7 South. Rep. 446.

⁵⁷ Provo City v. Shurtliff, 4 Utah, 15, 5 Pac. Rep. 302.

forbidden, although a general and entire prohibition would be unauthorized.⁵⁸ In accordance with the general principle, it is held that an ordinance entitled "regulating the use and sale of intoxicating liquors," but consisting in its substance entirely of prohibition, is not valid.⁵⁹ And so an authority to a municipal corporation to license lager-beer saloons does not carry with it the right to prohibit the sale of beer by the quart.⁶⁰ And what the municipality cannot do directly, by a prohibitory ordinance, it cannot do indirectly, by imposing a license fee or a tax so high in amount as to be virtually equivalent to prohibition. But in this connection, the reasonableness of the sum charged must be considered in connection with the nature of the business and other pertinent circumstances, and the courts will not be hasty in declaring a license fee to be prohibitive in its nature, unless it is clearly and obviously designed to prevent all persons from seeking licenses. For example, it is said that it cannot be assumed judicially that a city ordinance requiring the payment of fifty dollars every ninety days, for the privilege of retailing spirituous liquors, is a virtual prohibition of the sale of such liquors.⁶¹

On the other hand, the terms of the grant of power to a municipality may be so comprehensive as to include the authority necessary for entire prohibition. Thus, if the city has power to license and regulate retail liquor-selling, to annul and revoke licenses for cause shown, to close up retail establishments for such time as may be deemed necessary, and to prevent liquor-selling whenever deemed expedient, it is a fair inference that it may absolutely prohibit the sale of liquor.⁶² And where a village board is specifically authorized to "license, regulate, and prohibit" the sale of intoxicating liquor, they may, by ordinance, provide for the issuing of licenses in one part of the village and prohibit the sale of liquor in another part, if the discrimination as to places be not arbitrary and unreasonable.⁶³

⁵⁸ *Portland v. Schmidt*, 13 Oreg. 17, 6 Pac. Rep. 221.

⁵⁹ *Cantril v. Sainer*, 59 Iowa, 26, 12 N. W. Rep. 758.

⁶⁰ *State v. Garon*, 50 N. J. Law, 358, 13 Atl. Rep. 26.

⁶¹ *Ex parte Hurl*, 49 Cal. 557.

⁶² *In re Jones*, 78 Ala. 419.

⁶³ *People v. Cregier*, (Ill. Sup.) 28 N. E. Rep. 812.

And so, authority in the charter of a city to "restrain, prohibit, and suppress" dram-shops, will sustain an ordinance *licensing* such houses and prescribing penalties for keeping one without a license. "The word 'restrain' is not synonymous with 'prohibit' or 'suppress.'" It does not contemplate an absolute destruction of the business, but rather a placing it within bounds."⁶⁴

§ 228. Power Granted to Municipality cannot be Delegated.

As a general rule, where power is conferred upon a municipal corporation to regulate any calling or business, it is without power to delegate its discretionary authority to others, or to any individual. Such bodies are created to aid the government in the preservation of good order, and to protect more effectually persons in the particular community from injuries and annoyances that cannot be so readily guarded against by the general laws of the state. Their powers are conferred with the intention that they shall be exercised by the body created, and in the mode prescribed. And any departure from such authority, or any attempt by the body to transfer their powers to others, is unwarranted. Hence, if the charter of a city confers the power to license and regulate the sale of liquor upon the city council, this manifestly intends that the power shall be exercised by the council itself, under reasonable and proper ordinances, and not that they shall authorize an individual or officer to grant or refuse a license, or to fix the amount which should be paid for a license. And the council cannot delegate such power to the mayor.⁶⁵ In the proper exercise of the charter power, the city council should adopt general ordinances, prescribing a general rule by which licenses may be obtained. They might, no doubt, prescribe the character of per-

⁶⁴ *Emporia v. Volmer*, 12 Kans. 622. But in New Jersey, where a certain town was empowered by its charter to make ordinances "to license, regulate, and prohibit inns and taverns, and to prohibit all traffic in or sale of intoxicating drinks," it was held, that the power was only to prohibit, and not to

regulate, the sale of liquor. *State v. Fay*, 44 N. J. Law, 474.

⁶⁵ *East St. Louis v. Wehrung*, 50 Ill. 28; *Darling v. St. Paul*, 19 Minn. 389, (Gil. 336;); *In re Wilson*, 32 Minn. 145, 19 N. W. Rep. 723; *City of Kinnmundy v. Mahan*, 72 Ill. 462; *State v. Kantler*, 33 Minn. 69, 21 N. W. Rep. 856.

sons who might or might not obtain licenses; or they might, in their regular or called meetings, in such manner as they might ordain, grant such licenses. The ordinance should be of that general character that all persons coming within its requirements should be entitled, by complying with its provisions, to receive a license. And the amount to be paid should be determined by ordinance or order of the council, and not left within the discretion of a single officer of the city.⁶⁶ And on the same principle, an ordinance restricting the business of liquor-selling to certain districts of the city "to be designated by the mayor," is invalid in respect to the attempted restriction.⁶⁷

§ 229. Power of Municipality to Require Licenses.

"The grant of a license," says Judge Cooley, "may be made by the state directly, or it may be made indirectly through one of the municipal corporations of the state. Of the indirect grant, it is to be observed that a municipal corporation as such has no inherent power to grant licenses or exact license fees; it must derive all its authority in this regard from the state, and the power must come by direct grant and cannot be taken by implication."⁶⁸ It follows, therefore, that if a city or town is not empowered by its charter, or by a law of the state applicable to municipal corporations, to require a license of any person for selling intoxicating liquor within its limits, any attempt to impose such a condition on the business is unauthorized and nugatory, since the necessary power could be derived from no other source.⁶⁹ But on the other hand, if adequate authority is granted to the municipality, it may undoubtedly provide for the issuing of licenses to suitable persons, and prohibit, under penalties, the sale of liquor by unlicensed persons; and an ordinance intended to effect these objects is not open to objection as being in restraint of trade, nor as depriving the citizen of his liberty, rights, or property.⁷⁰ The

⁶⁶ East St. Louis v. Wehrung, 50 Ill. 28.

⁶⁷ State v. Kantler, 33 Minn. 69, 21 N. W. Rep. 856.

⁶⁸ Cooley, Taxation, 597.

⁶⁹ Deutschman v. Charlestown, 40

Ind. 449; Steinmetz v. Versailles. Id. 249; Martinsville v. Frieze, 33 Ind. 507.

⁷⁰ City of Rochester v. Upman, 19 Minn. 108, (Gil. 78; Lawrenceburg v. Wuest, 16 Ind. 337; Cheny v. Shelbyville, 18 Ind. 84; *Ex parte* Schneider, 11 Ore. 288, 8 Pac. Rep. 289.

prohibition of the sale of liquors without the required license will be valid and operative, notwithstanding such sale is not prohibited by the laws of the state.⁷¹ And conversely, although the statute may make it an offense to sell without a license from the state or county, this does not interfere with the power of the municipality, if duly authorized, to provide a license system of its own, and enact penalties for its violation.⁷² When it is intended to confer this power upon a municipal corporation, the appropriate word to use in its charter is without doubt the word "license." But there are certain other terms, frequently found in this connection, which, though less directly significant of the legislative intention to grant the power in question, have been held sufficient to convey it. Thus, it appears that power given to "restrain and prohibit" the sale of liquor includes the power to license persons or houses for such sale and to impose a penalty for pursuing the business without license.⁷³ And the same consequence is deduced from a grant of power to "regulate or prohibit" the sale of liquor and to "impose a tax on such sale."⁷⁴ And power given to a municipality either to "tax" or to "restrain" such sale is held to carry with it the authority to grant licenses therefor.⁷⁵ As to the power of a municipality, under such a grant of authority, to regulate the sale of liquor at wholesale, or to fix the quantity which shall determine the difference between wholesale and retail, there is some conflict among the authorities. In Illinois, it is held that an ordinance requiring a license to legalize the sale of spirits or wine in quantities of a gallon or more at a time, is authorized and valid.⁷⁶ But in Minnesota, where the state law authorizes sales in quantities of five gallons and upwards without license, it appears that the ordinances of municipalities must observe the same distinction, although their validity, in this respect, cannot be questioned by one who is

⁷¹ City of Burlington v. Kellar, 18 Iowa, 59.

⁷² City of Elk Point v. Vaughn, 1 Dak. 113, 46 N. W. Rep. 577; State v. Pfeifer, 26 Minn. 175, 2 N. W. Rep. 474; State v. Fleckenstein, 26 Minn. 177, 2 N. W. Rep. 475.

⁷³ St. Louis v. Smith, 2 Mo. 113; Emporia v. Velmer, 12 Kans. 622.

⁷⁴ Keokuk v. Dressell, 47 Iowa, 597. But compare Burlington v. Bumgardner, 42 Iowa, 673.

⁷⁵ Town of Mt. Carmel v. Wabash Co., 50 Ill. 69.

⁷⁶ Ammon v. Chicago, 26 Ill. App. 641; Dennehy v. Chicago, 120 Ill. 627, 12 N. E. Rep. 227.

proceeded against for an unlicensed sale in a quantity below that limit.⁷⁷ The power of a municipal corporation to regulate the liquor traffic, being a branch of the police power, extends no further than is necessary for the protection of the particular community. But a licensing ordinance is effective as against one selling liquor within the territorial jurisdiction of the municipality, though outside its corporate limits, and though the seller himself is a resident of another township.⁷⁸ Where a municipality has power to provide for a system of licenses, it has also, by necessary implication, the power to make such provisions as will tend to restrict the grant of licenses to persons who are suitable to be intrusted with the privilege, and to secure the lawful and orderly conduct of the business. Thus, it may require the applicant for a license to "produce the written recommendation of four of his nearest neighbors."⁷⁹ And it may also require licensees to furnish a bond.⁸⁰ And it has power to provide that the sale of liquor without a license shall be a punishable offense.⁸¹ Finally, it is to be remarked that a city ordinance generally prohibiting the sale of liquor, under a penalty, will be repealed by a later ordinance prohibiting its sale without a license.⁸²

§ 230. Power to Exact License Fees.

If a municipal corporation, by its charter or a general law, is invested with power to require liquor-dealers to take out a license, it also has the authority to require the payment of a fee for the privilege, and to fix the amount of the same within reasonable limits.⁸³ But if the sum chargeable for license fees is not left to the discretion

⁷⁷ *State v. Priester*, 43 Minn. 373, 45 N. W. Rep. 712.

⁷⁸ *Emerich v. Indianapolis*, 118 Ind. 279, 20 N. E. Rep. 795.

⁷⁹ *Whitten v. Covington*, 43 Ga. 421. Where the privilege is restricted to male inhabitants of the state, a person answering that description, being prosecuted for selling without license, cannot complain that an unjust discrimination is made against women and non-

residents. *Wagner v. Garrett*, 118 Ind. 114, 20 N. E. Rep. 706.

⁸⁰ *Ex parte Schneider*, 11 Oreg. 288, 8 Pac. Rep. 289.

⁸¹ *Schweitzer v. Liberty*, 82 Mo. 309.

⁸² *Barton v. Gadsden*, 79 Ala. 495.

⁸³ *Portland v. Schmidt*, 13 Oreg. 17, 6 Pac. Rep. 221; *In re Stuart*, 61 Cal. 374; *Ex parte Wolters*, 65 Cal. 269, 3 Pac. Rep. 894.

of the municipal authorities, but is regulated, in respect to its maximum amount, by the provisions of the charter or statute, it is plain that the corporation cannot act in excess of its authority, and an ordinance attempting to impose a higher license fee than the municipality had lawful power to exact would be invalid.⁸⁴ Further, the mode of fixing or estimating the amount chargeable must follow the terms of the grant of power. To illustrate, where a city is empowered to exact license fees "from each brewer or distiller, not less than \$50, nor more than \$500," and to "grade, class, and fix the rate of license within the minimum and maximum amounts designated," and it passes an ordinance requiring brewers to pay "one-tenth of one per cent. on the amount of liquor manufactured," with a proviso that each brewer shall be required to pay at least \$15 per annum, such ordinance is unauthorized and invalid, by reason of its want of conformity to the statutory grant of power.⁸⁵ As a rule, the conferring upon a municipal corporation of the power to license the sale of liquor, does not contemplate the employment of this species of taxation as a means of raising revenue, but only as a police regulation for the protection of the good order and public interests of the community. But a provision in a city charter giving the common council power to regulate the sale of liquors, and to fix the amount to be paid for licenses, and directing that the money received for licenses shall be paid to the treasurer for the use of the city, is held to confer the taxing power for revenue purposes.⁸⁶ An ordinance raising the amount of the license fee is not retroactive in declaring that all sales made thereafter without the payment of the additional fee are illegal.⁸⁷ Further, the power to impose a license fee includes the power to provide for its collection, as by designating the person to whom

⁸⁴ *Drew Co. v. Bennett*, 43 Ark. 364; *State v. Chase*, 33 La. Ann. 287. Where cities were authorized to demand a license fee for the sale of intoxicating liquors of not more than \$250, and a city ordinance provided for a license fee of \$250, and for a fee of \$1 to the clerk issuing the same, *held*, that one who refused to take out a license, and continued to sell, in violation of the

ordinance, would not be heard to complain that the fee of \$1 was in excess of the authority granted to the city. *Moore v. Indianapolis*, 120 Ind. 483, 22 N. E. Rep. 424.

⁸⁵ *Kniper v. Louisville*, 7 Bush, 599.

⁸⁶ *State v. Plainfield*, 44 N. J. Law, 118.

⁸⁷ *Moore v. Indianapolis*, 120 Ind. 483, 22 N. E. Rep. 424.

such fees shall be paid.⁸⁸ And an ordinance requiring the payment of a license fee every ninety days, for the privilege of selling liquor, is not unreasonable or unconstitutional.⁸⁹ But the power of a city to license and collect license charges being a delegated police power, the legislature retains the power to so amend its charter as to divert a part of such license charges into the treasury of the county.⁹⁰

§ 231. Limitation of Municipal Power as to Amount of Fee Chargeable.

As a general rule, a grant of power to a municipal corporation to license trades or pursuits for police purposes only, must be exercised as a means of regulation alone, and cannot be converted into a source of revenue. But a license for regulation, in such sum as may be reasonably necessary to promote the legitimate objects of the police power (which includes the protection of the lives, health, and property of citizens, the preservation of the public morals, and the maintenance of the peace and good order of the community) in the district in which the ordinance is designed to operate, will be held an exercise of the police power and not of the power of taxation. In determining whether the ordinance is to be construed as an exercise of one or the other of these powers, the amount required as the price of a license is material. And it is material also in determining whether the ordinance is intended for regulation only, or is so exorbitant as to be virtually prohibitive and therefore *ultra vires*. In the case of useful trades or employments, and *a fortiori* in the case of such as are noxious or dangerous, the amount exacted for a license, in the exercise merely of the police power, and designed for regulation only, is not to be confined to the expense of issuing the license, but a reasonable compensation may be charged for the additional expense of municipal supervision over the particular business or vocation at the place where it is licensed; and the courts will not scrutinize the amount too narrowly, with the view of adjudging it a tax for revenue.⁹¹ It is of course impossible to state any precise

⁸⁸ *Ex parte* Lawrence, 69 Cal. 608, 11 Pac. Rep. 217.

⁸⁹ *Ex parte* Hurl, 49 Cal. 557.

⁹⁰ *Winona v. Whipple*, 24 Minn. 61.

⁹¹ *Van Hook v. Selma*, 70 Ala. 361; *Cooley*, Const. Lim. 201.

amount beyond which a license fee would be regarded, in all instances, as entering the field of taxation for revenue. This must be determined, in each case, with reference to the population, character, and peculiar circumstances of the municipality, and the general policy of the state with reference to its liquor legislation. In several states, it is held that an ordinance fixing the fee for a retail liquor-dealer's license at \$500, or less, is not unreasonable or objectionably prohibitory.⁹² But it has been ruled that a fee of \$1000 is too great to be merely designed as a regulation, and amounts in effect to prohibition.⁹³

§ 232. Differential and Discriminating Rates.

That the fee for a liquor license is not the same in amount in all the municipalities in a state is not a valid objection to a legislative grant of power to a city to exact license fees, or to an ordinance putting such power into operation. For although taxes must be uniform throughout the city levying them, they need not be the same throughout different cities.⁹⁴ And it is also settled that a city cannot be required to tax all avocations or pursuits alike, but may discriminate against such as are hurtful or dangerous to the community, by subjecting them to the payment of a larger license fee than is required of others.⁹⁵ On similar principles, a county ordinance regulating the licensing of the liquor traffic, is not invalid because it fixes a less rate for selling at a wayside tavern or watering-place than in a village or city.⁹⁶ Furthermore, within the same city, the ordinance may properly impose different rates according to the locality in which the licensed shop is situated, provided it does not discriminate between persons. That is, it may be differential in its character, based upon the relative advantages of locality, if it does not discriminate as between persons having equal facilities for profit.⁹⁷

⁹² *Perdue v. Ellis*, 18 Ga. 586; *Sweet v. Wabash*, 41 Ind. 7; *Wiley v. Owens*, 39 Ind. 429; *City of Elk Point v. Vaughn*, 1 Dak. 113, 46 N. W. Rep. 577.

⁹³ *Ex parte Burnett*, 30 Ala. 461.

⁹⁴ *Wiley v. Owens*, 39 Ind. 429.

⁹⁵ *Ex parte Hurl*, 49 Cal. 557; *Mayor*

of Columbia v. Beasley, 1 Humph. 232, 34 Am. Dec. 646.

⁹⁶ *Amador Co. v. Kennedy*, 70 Cal. 458, 11 Pac. Rep. 757.

⁹⁷ *East St. Louis v. Wehrung*, 46 Ill. 392.

And in Pennsylvania, it is held that a city ordinance dividing liquor-dealers into different classes, according to the amount of their sales, and imposing a license tax varying in amount according to the class, is not in conflict with the provision of the state constitution that "all taxes shall be uniform upon the same class of subjects."⁹⁸ So in Kansas, under the statutes, there is a difference between druggists who have permits to sell intoxicating liquors and those who have not; and therefore a city may levy a higher license tax on those of the former class than on those of the latter.⁹⁹

§ 233. Providing for Revocation of License.

Where power is conferred upon a municipal corporation to prohibit entirely the sale of intoxicating liquors, or to regulate or license the same, at discretion, it may grant the privilege of selling such liquors on such terms and conditions as it may see fit to impose, and it has ample power to provide, as a condition, that a license granted shall be subject to revocation on the violation of any of the statutes or ordinances regulating the traffic.¹⁰⁰ And where the grant of power to the municipality contains a provision to the effect that no license shall be granted for a less term than one year, this does not deprive the municipal authorities of the right, in the exercise of their power of regulation, to revoke a license before the expiration of the year for which it was issued.¹⁰¹ In Florida, however, an act was held unconstitutional which attempted to invest the boards of county commissioners with judicial power to hear, try, and determine complaints against holders of licenses, and to impose penalties by revok-

⁹⁸ *Gross v. Allentown*, 132 Pa. St. 319, 19 Atl. Rep. 269. In this case it was said: "It is argued here that the grading of the license tax according to the amount of the annual gross sales is illegal, because it is not uniform. (that all liquor-sellers should be required to pay the same amount.) and that, by making the amount of sales a basis, it is, in effect, an income tax. But this is not a taxing of the person of the liquor-seller, but of his property, esti-

mated by the volume of the annual sales. A tax of this character, graded in the same way, for state purposes, has been levied and collected for many years."

⁹⁹ *Tulloss v. Sedan*, 31 Kans. 165, 1 Pac. Rep. 285.

¹⁰⁰ *Schwuchow v. Chicago*, 68 Ill. 444; *Sprayberry v. Atlanta*, (Ga.) 13 S. E. Rep. 197; *State v. Rouch*, (Ohio,) 25 N. E. Rep. 59.

¹⁰¹ *State v. Dwyer*, 21 Minn. 512.

ing licenses, on the ground that it was an attempt to create courts not authorized by the constitution.¹⁰²

§ 234. Ordinances Regulating Sale of Liquor.

When a municipal corporation is invested with power to license or regulate the sale of intoxicating liquors, it has the implied authority to make all such ordinances as may be necessary to make the grant of power effectual, and to accomplish the ends of municipal good order and public security intrusted to its care. Thus, as a necessary incident to the power to license the traffic, it possesses the power to prohibit the bartering or giving away of liquor without a license.¹⁰³ So a city ordinance regulating the sale of unfermented cider, by prohibiting its sale in less quantities than a gallon, and forbidding the drinking of the same at the place of sale, violates no private right, and is not an unreasonable restraint of trade.¹⁰⁴ So also, the municipality may lawfully adopt an ordinance prohibiting the sale or gift of intoxicating liquors to an habitual drunkard.¹⁰⁵ And it may make reasonable regulations as to where the sale of liquor may be carried on, *e. g.*, within what parts, districts, or precincts of the city.¹⁰⁶ And power to license places for the sale of liquor justifies an ordinance which forbids such sale in unlicensed places.¹⁰⁷ It is also held that a city may provide that no liquor shall be used or kept in any refreshment saloon or restaurant within the city for any purpose whatever.¹⁰⁸ As to the persons who may be accorded the privilege, and the purposes for which they may exercise it, the municipality has also a proper measure of discretion. Thus, an ordinance prohibiting druggists from selling liquor except for medicinal purposes, is within a granted charter power to license, regulate, or restrain, and is not unreasonably oppressive or against public policy.¹⁰⁹ But on the other hand, a grant of authority to pro-

¹⁰² *State v. Brown*, 19 Fla. 563.

¹⁰³ *Vinson v. Monticello*, 118 Ind. 103, 19 N. E. Rep. 734.

¹⁰⁴ *Lawrence v. Monroe*, 44 Kans. 607, 24 Pac. Rep. 1113.

¹⁰⁵ *Woods v. Prineville*, 19 Oreg. 108, 23 Pac. Rep. 880.

¹⁰⁶ *In re Wilson*, 32 Minn. 145, 19 N. W. Rep. 723.

¹⁰⁷ *State v. Beverly*, 45 N. J. Law, 288.

¹⁰⁸ *State v. Clark*, 28 N. H. 176.

¹⁰⁹ *Provo City v. Shurtliff*, 4 Utah, 15, 5 Pac. Rep. 302.

hibit tippling-houses or dram-shops does not empower the town to forbid sales in any quantity or for any purposes except medicinal and mechanical purposes.¹¹⁰ As to the practice and procedure before the municipal tribunals, in cases of violations of such ordinances, the corporation may make such regulations as it may deem expedient, provided that they are not inconsistent with the laws of the state.¹¹¹

§ 235. Ordinance Prohibiting Sale on Sunday.

When a municipal corporation is invested with power to regulate and license the sale of intoxicating liquors, and to provide by ordinance for the peace, good order, and security of the community, it has unquestionably the power to command that all bar-rooms and drinking-saloons within its limits shall be closed on Sunday, and to prohibit, under penalties, the sale of liquor on that day.¹¹² Nor is it necessary that the ordinance should except from its operation cases of necessity, charity, or conscientious observance of the seventh day of the week.¹¹³ But where the law of the state authorizes the sale of liquor, by licensed innkeepers, to lodgers and lawful travelers on Sunday, a city ordinance which prohibits such sales, as between such persons is, to that extent, unauthorized and invalid by reason of its conflict with the statute.¹¹⁴ Whether the same act of sale may constitute an offense against both a statute and a municipal ordinance, each directed against selling on Sunday, or whether the ordinance would be nugatory where the subject was already provided for by the state law, is not entirely clear upon the authorities.¹¹⁵ No doubt much would depend upon the language of the statute, as showing its degree of comprehensiveness, and the terms of the grant of power to the municipality.

¹¹⁰ *Strauss v. Pontiac*, 40 Ill. 301.

¹¹¹ *Jackson v. Boyd*, 53 Iowa, 536, 5 N. W. Rep. 734.

¹¹² *Schwuchow v. Chicago*, 68 Ill. 444; *Piqua v. Zimmerlin*, 35 Ohio St. 507; *Nashville v. Linck*, 12 Lea, 499; *Gabel v. Houston*, 29 Tex. 335; *Minden v. Silverstein*, 36 La. Ann. 912; *Megowan v. Comm.*, 2 Metc. (Ky.) 3.

¹¹³ *Piqua v. Zimmerlin*, 35 Ohio St. 507.

¹¹⁴ *Wood v. Brooklyn*, 14 Barb. 425.

¹¹⁵ See *City of Elk Point v. Vaughn*, 1 Dak. 113, 46 N. W. Rep. 577; *People v. Furman*, (Mich.) 48 N. W. Rep. 169; *Ex parte Peacock*, 25 Fla. 478, 6 South. Rep. 473.

§ 236. Prescribing Hours of Closing Saloons.

In the exercise of its police power for the protection of the public peace and tranquillity, and of its power to regulate the liquor traffic, a municipal corporation may lawfully provide that all licensed houses shall close their doors and cease doing business at a proper and reasonable hour of the evening. What hour may be designated,—keeping in view both the right of the citizens to protection against nocturnal disturbances and the right of the licensed vendor to ply his vocation without unreasonable hindrance,—is a question that cannot be determined arbitrarily, but must depend, in some measure at least, upon the character, population, and habits of the particular community. A regulation which would be reasonable and proper in a village of farmers might be quite the reverse in a populous city. Ordinances have been held valid which required saloons to be closed at eleven o'clock at night,¹¹⁶ or at ten o'clock,¹¹⁷ or even at nine o'clock.¹¹⁸ But on the other hand, an ordinance forbidding licensed retailers to sell between the hours of six in the evening and six in the morning has been thought unreasonable and invalid.¹¹⁹ And so an ordinance requiring all such persons to close their doors and cease selling whenever "any denomination of Christian people are holding divine service" anywhere in the town, is not valid.¹²⁰ And in another case, where the board of police commissioners of a city were authorized to order the closing of all drinking-saloons "temporarily," whenever, in their judgment, the public peace required it, and they issued an order that drinking-saloons "be so temporarily closed until further notice," it was held that, although the legislature could lawfully confer the power it had granted, yet the board had authority only to

¹¹⁶ *Decker v. Sargeant*, 125 Ind. 404, 25 N. E. Rep. 458.

¹¹⁷ *State v. Washington*, 44 N. J. Law, 605, 45 N. J. Law, 318, 43 Am. Rep. 402; *Ex parte Wolf*, 14 Nebr. 24, 14 N. W. Rep. 660; *Morris v. Rome*, 10 Ga. 532; 1 *Dillon, Munic. Corp.* § 400.

¹¹⁸ *Smith v. Knoxville*, 3 Head, 245.

¹¹⁹ *Ward v. Greeneville*, 8 Baxt. 228.

Said the court: "We are of opinion that a prohibition which deprives a party of several hours of daylight, in which he is forbidden to exercise a right conferred by the state, is unreasonable and oppressive." See, also, *Grills v. Jonesboro*, 8 Baxt. 247.

¹²⁰ *Gilham v. Wells*, 64 Ga. 192.

close the saloons for a short and definite interval, and consequently the order in question was void.¹²¹

§ 237. Prohibiting Employment of Women in Saloons.

Where a municipal corporation is invested with power to "regulate" bar-rooms and drinking-saloons, it is held to be a reasonable and proper exercise of this authority to prohibit the employment of women in such places.¹²² In California, however, where the constitution provides that no person shall be disqualified by sex from pursuing any lawful vocation, a decision has been rendered that an ordinance forbidding the proprietors of drinking-saloons to permit any female to be there after a certain hour of the evening, is unconstitutional.¹²³

¹²¹ State v. Strauss, 49 Md. 288.

¹²³ *In re Maguire*, 57 Cal. 604, 40 Am

¹²² Bergman v. Cleveland, 39 Ohio St. Rep. 125.
651.

CHAPTER XI.

LAWS AGAINST ADULTERATION OF LIQUOR.

- § 238. Statutes Prohibiting Adulteration.
- 239. Constitutionality of Such Statutes.
- 240. Construction and Operation of Statutes.
- 241. Oath and Bond against Adulteration.

§ 238. Statutes Prohibiting Adulteration.

In many of the states, laws have been enacted against the adulteration of liquor, sold or intended for sale, with any substance that is poisonous in its nature or deleterious to human health. Various means have been adopted by different legislatures to accomplish the same end. In some jurisdictions, the adulteration of liquor is made a criminal offense. Thus, in Massachusetts, the statute is expressed in the following very specific terms: "Whoever adulterates, for the purpose of sale, any liquor used or intended for drink, with Indian cockle, vitriol, grains of paradise, opium, alum, capsicum, copperas, laurel water, logwood, Brazil wood, cochineal, sugar of lead, or any other substance which is poisonous or injurious to health, and whoever knowingly sells any such liquor so adulterated, shall be punished by imprisonment in the state prison not exceeding three years, and the articles so adulterated shall be forfeited."¹ A similar statute in Connecticut prohibits the manufacture, sale, or keeping for sale of any adulterated liquors, under penalty of a fine of not more than \$250.² In other states, persons who receive licenses to sell intoxicating liquors are required to take an oath that they will not adulterate the commodities which they offer for sale, and to furnish a bond conditioned upon their due observance of this obligation.³ In others, it is enacted that the impure, vitiated, or adulterated condition of any liquors sold shall constitute a full defense to an action

¹ Pub. St. Mass. 1882, c. 208, § 4.

State, 4 Baxt. 289; State v. Ferguson, 72 Mo. 297.

² Gen. St. Conn. 1888, § 3100.

³ Acts Tenn. 1859, c. 81, § 4; Levi v.

for the recovery of their price or value.⁴ And in still others, a system of inspection is provided, by which it is intended to detect and condemn impure articles of this character.

§ 239. Constitutionality of Such Statutes.

It is a settled principle of constitutional law that the legislature of a state, in the exercise of its police power, has authority to enact reasonable and proper laws for the protection of the public health. And statutes intended to secure the purity and wholesomeness of food products have, from the earliest times, been adjudged valid. If, therefore, the law-making body has general police control over the liquor traffic, and if the use of alcoholic beverages is intimately connected with the health of the community, and if, further, the evils which such use engenders are, in a considerable degree, aggravated by the sale and consumption of doctored and adulterated articles, there is no reasonable ground to question the constitutionality of the statutes under consideration. These laws cannot, in any proper sense, be said to deprive the citizen of his liberty or property without due process of law, unless their restrictions are so unreasonable and oppressive as to be palpably in excess of the exigencies of the occasion.⁵

§ 240. Construction and Operation of Statutes.

The laws against adulteration, it is held, are intended to reach spirituous liquors containing poisonous or deleterious ingredients, and prevent the sale of them, whether those ingredients were added to pure liquors, or were used in compounding an imitation, or were added to the imitation. And it is not necessary to a conviction, under their penal provisions, that it should be proved that the defendant knew that the liquor was adulterated.⁶ But in Pennsylvania, where the statute provides that, in all actions for the price or value of liquor sold, the fact that it was impure, vitiated, or adulterated shall constitute a good and sufficient defense, it is held that this applies

⁴ Act Penna. Mar. 29, 1860.

⁶ State v. Stanton, 37 Conn. 421.

⁵ *Ex parte Kohler*, 74 Cal. 38, 15 Pac. Rep. 436.

only in those cases where the quality or value of such liquor has been impaired by the impurity or adulteration.⁷ In California, there is a statute providing that "it is desired and required that all and every grower, manufacturer, trader, holder, or bottler of California, when selling or putting up for sale any California wine, . . . shall plainly stencil, brand, or have printed where it will be plainly seen, —first, 'Pure California Wine,' and secondly, his name, or the firm's name, as the case may be, on label of bottle or package." It is held that this law is merely directory, and no punishment can be inflicted for selling pure California wine without such label or brand, or the label furnished by the state.⁸

§ 241. Oath and Bond against Adulteration.

In some of the states, as already remarked, persons dealing in the sale of liquor are required by statute to take an oath and furnish a bond against the adulteration of their commodities. It is held that these provisions apply to druggists. They cannot lawfully sell liquor, even upon a physician's prescription, without taking the statutory oath not to adulterate.⁹ And they are not exempted from giving the statutory bond, notwithstanding the fact that, by another section of the same statute, they are permitted to mix or adulterate liquors in compounding medicines or preparations for mechanical uses.¹⁰ It is also considered that statutory requirements of this character should be closely complied with. For example, where the law requires a liquor-seller to take an oath not to "mix or adulterate with any substance whatever," it is not a sufficient compliance with this provision if he takes an oath not to "mix or adulterate with any poisonous substance whatever."¹¹ These statutes are not to be considered as repealed by a later act providing for the inspection of liquors offered for sale.¹² But where a sale of liquor is made after the enactment of an inspection law, but before an inspector is

⁷ *Clohesy v. Roedelheim*, 99 Pa. St. 56.

⁸ *Ex parte Kohler*, 74 Cal. 38, 15 Pac. Rep. 436.

⁹ *Newman v. State*, 7 Lea, 617.

¹⁰ *State v. Ferguson*, 72 Mo. 297.

¹¹ *Hall v. State*, 9 Lea, 574.

¹² *State v. Martin*, 3 Heisk. 487.

appointed and qualified for the particular county or district, the omission to have the liquor inspected will not preclude the vendor from recovering the agreed price, in an action for that purpose, where it is not shown that the liquor was impure or adulterated.¹³

¹³Smith v. Kibbee, 9 Ohio St. 563.

CHAPTER XII.

EFFECT OF LIQUOR LAWS ON CONTRACTS AND RIGHTS OF ACTION.

- § 242. Property in Intoxicating Liquors.
- 243. Liquor is a Subject of Larceny.
- 244. Action for Wrongful Taking or Conversion of Liquor.
- 245. Statute Forbidding Recovery of Possession or Value.
- 246. Mortgage of Liquors.
- 247. Insurance of Liquors.
- 248. No Recovery on Illegal Contract.
- 249. No Action for Price of Liquors Illegally Sold.
- 250. Proof of Illegality of Sale.
- 251. Entire and Divisible Accounts.
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- 255. Laws Forbidding Credit for Liquor Sold.
- 256. Note Given on Illegal Sale of Liquor is Void.
- 257. Proof of Illegality of Note.
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- 259. Rights of Innocent Holder for Value.
- 260. Proof of Character of Holder.
- 261. Purchaser of Note after Maturity.
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- 264. Executory Contract may be Repudiated.
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- 266. Recovery for Liquors Sold in Another State.
- 267. Determination of Place of Sale.
- 268. Same; Agent Taking Order.
- 269. Knowledge of Buyer's Illegal Purpose not Sufficient to Prevent Recovery.
- 270. Participation in Illegal Design Defeats Action.
- 271. Contract Void where Made Void Everywhere.
- 272. Statute Forbidding Recovery on Foreign Sales.
- 273. Laws Forbidding Soliciting of Orders.
- 274. Contracts against Policy of Liquor Laws.
- 275. Avoidance of Leases.
- 276. Who may Take Advantage of Illegality.

§ 242. Property in Intoxicating Liquors.

Although intoxicating liquors, by reason of the evils attending their misuse or excessive use, are regarded as proper subjects for close police surveillance, and are put under the ban of the law whenever owned, kept, or transferred for any illegal purpose, it does not follow that they are incapable of being lawfully held in possession, or that they are not subjects over which ownership can be exercised. On the contrary, such liquors, when not held under circumstances to constitute their possession a nuisance or a penal offense, are property, and are entitled to protection as such.¹ Even in a state where a general prohibitory liquor law exists, it is possible to own and possess intoxicating liquors lawfully. For a person may have purchased such property outside the state, intending it for his private consumption, or he may have bought it from an authorized agent within the state for medicinal or mechanical purposes. Hence, if the liquor was purchased in another state, the owner may maintain an action against a common carrier who was bringing it to him, and by whose fault or negligence it was lost or destroyed. And in such action the plaintiff is not bound, as against the defendant, to show the lawfulness of his ownership. For the presumption against his lawful ownership for a proper use could not arise while the liquor was in transit, or until it had reached his hands. But if the carrier would defend on the ground that the liquor was held for an unlawful purpose, the burden is on him to show that the ownership existed under such circumstances as to constitute the liquor a nuisance.² On similar principles, it is held that liquors of domestic manufacture, if not kept for illegal sale, are subject to taxation like any other species of property.³ And it is no defense to an action by one partner against another for conversion of

¹Brown v. Perkins, 12 Gray, 89.

²Bowen v. Hale, 4 Iowa, 480. In a later decision in the same state, (Sommer v. Cate, 22 Iowa, 585,) it was held that the plaintiff must allege and prove that he owned or possessed the liquor with lawful intent and not for the purpose of sale. The court said that "this

precise question" was not presented or determined in Bowen v. Hale. But it is difficult to escape the conclusion that it *was* involved in that case and was rightly determined. The later decision is not so satisfactory or so well supported by principle.

³Dunbar v. Boston, 101 Mass. 317.

partnership property that the firm were unlawfully engaged in selling intoxicating liquors.⁴

§ 243. Liquor is a Subject of Larceny.

From the conception of intoxicating liquor as property, it follows that it is a subject in respect to which larceny may be committed. And the authorities hold that it is not a good defense to an indictment for stealing such liquor, that the same was bought, kept, owned, or intended for sale, in violation of law.⁵ "It is a principle or rule of property, as old as the common law itself, that the possession of one is good against all others who cannot show a better right of possession. Hence he who steals a stolen article of property from a thief may be himself convicted, notwithstanding the criminality of the possession by his immediate predecessor in crime."⁶ And it is laid down that whatever is produced by wrong is the subject of larceny, the same as the products of right.⁷ *A fortiori*, money received for intoxicating liquors, sold contrary to the inhibitions of a penal statute, may be stolen with the same consequences as any other money.⁸

§ 244. Action for Wrongful Taking or Conversion of Liquor.

We have seen that intoxicating liquor, when not kept for an unlawful purpose, has the character of property; and that the title of the holder must prevail against any person who cannot show a better right to the possession. It follows that the wrongful taking of liquor from the possession of a person who is not holding it in violation of law is a tort, and the person injured may maintain an action against the wrong-doer.⁹ Thus, in the absence of a statute to the contrary, if liquor belonging to one person is seized under an execu-

⁴ *Howe v. Jolly*, (Miss.) 8 South. Rep. 513.

⁵ *Comm. v. Coffee*, 9 Gray, 139; *State v. May*, 20 Iowa, 305.

⁶ *State v. May*, *supra*, citing 1 Hale,

P. C. 507; *Ward v. People*, 3 Hill, (N. Y.) 309.

⁷ 2 Bishop, *Crim. Law*, § 690.

⁸ *Comm. v. Rourke*, 10 Cush. 397.

⁹ *Harrison v. Nichols*, 31 Vt. 709.

tion against another person, the owner may properly replevy and recover it from the possession of the officer.¹⁰ And where a statute prohibits the maintenance of suits upon contracts made for liquor illegally sold, this will not be construed to prohibit actions of trover for the unlawful taking and conversion of such liquor, even though the plaintiff founds his possession on a purchase which was in violation of law.¹¹ So intoxicating liquors purchased for a lawful purpose are not liable to attachment in the hands of the purchaser at the suit of a creditor of the seller.¹² But a vendor, who has sold liquor in violation of law, cannot maintain replevin against attaching creditors of the vendee, or the sheriff executing the process, to recover possession thereof, on the ground that, the sale being void, he is entitled to such possession. For courts will not assist parties to regain what they have parted with for an illegal purpose, and the same principle obtains where they seek to recover what they sold in violation of law. *In pari delicto melior est conditio possidentis*.¹³ And the owner of liquors seized by virtue of a warrant in due form against him, under the search and seizure law, cannot replevy them from the possession of the officer who executed the process.¹⁴

§ 245. Statute Forbidding Recovery of Possession or Value.

In several of the states, as an adjunct to the prohibitory system of liquor legislation, statutes have been enacted forbidding the maintenance of any action for the recovery of the possession or value of any intoxicating liquors. If given an effect fully commensurate with their broad terms, these statutes would entirely destroy all property in such liquors, and would deny a remedy even to an innocent and

¹⁰ *Monty v. Arneson*, 25 Iowa, 383. But the owner of intoxicating liquors, suing to recover damages from an officer who had been adjudged to have no authority for their detention, must allege and prove that he owned and kept them with a lawful intent, and not for the purpose of sale contrary to law. *Walker v. Shook*, 49 Iowa, 264.

¹¹ *Sullivan v. Park*, 33 Me. 438; *Breck v. Adams*, 3 Gray, 569.

¹² *Niles v. Fries*, 35 Iowa, 41.

¹³ *Marienthal v. Shafer*, 6 Iowa, 223.

¹⁴ *Musgrave v. Hall*, 40 Me. 498; *State v. Harris*, 38 Iowa, 242; *Weir v. Allen*, 47 Iowa, 482.

lawful owner who had been deprived of his possession by a mere tort-feasor. But the courts have been unwilling to put such a construction upon the acts in question. They hold that the statutes apply only in cases where the liquors, for the possession or value of which the action is brought, were kept for an illegal purpose and under such circumstances as to render them liable to seizure and forfeiture, or were sold, or intended for sale, in violation of law. Beyond this, it is held, the statutes could not constitutionally be carried.¹⁵ Under this construction, it becomes a question of the lawfulness of the plaintiff's possession. And in an action of trespass, for example, for taking the plaintiff's liquors without legal authority, there can be no recovery, if the jury believe that the liquors were intended for sale in violation of law.¹⁶ This legality of possession, as a requisite

¹⁵ *Preston v. Drew*, 33 Me. 558, 54 Am. Dec. 639; *Jones v. Fletcher*, 41 Me. 254; *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290; *Robinson v. Barrows*, 48 Me. 186. In *Preston v. Drew*, *supra*, the determination of the court was stated and justified in the following language: "The court cannot decide by an application of the rules of the common law, or by the provisions of the act, that property cannot be acquired in spirituous and intoxicating liquors. The language of the act, which declares that no action shall be maintained for the recovery or possession of such liquors or their value, is without limitation, and, by a literal construction, it would deprive one who had purchased them of a town or city agent, for allowable purposes, of the right to maintain an action to recover them or their value from a person who had taken them from his possession without any right or authority, or who had wantonly destroyed them. It would also deprive the town and city agents of all right to maintain an action for the recovery of such liquors which had been purchased by them for sale according to the provisions of the act, and which had been unlawfully taken from them or destroyed. It would also

deprive a person of all remedy for the protection of such property by action, when procured for his private use and not intended for sale, and when he was carrying it through the state without any intention of sale in this state. Can one conclude that an intelligent legislature could have intended to hold out such temptations for the lawless subtraction or destruction of private property? The results are too extraordinary and unjust to allow an intelligent and considerate mind to believe that they could have been foreseen and approved. The general language must therefore be restricted so as to accomplish the general intent and declared purpose of the act, without producing such results, or the provision now under consideration must be pronounced to be a plain violation of the provisions of the constitution, and void. The general intent and declared purpose of the act would in no degree be infringed by regarding the general language to be so limited as to forbid the maintenance of any action for the recovery of possession of such liquors or their value, which were liable to seizure and forfeiture, or intended for sale in violation of the provisions of the act."

¹⁶ *Dolan v. Buzzell*, 41 Me. 473.

to the maintenance of the action, must be shown as well by a person claiming a special or qualified property in them, when such person sues for their conversion, as by the general owner. Thus, under a prohibitory law, spirituous liquors cannot legally be attached on mesne process or seized on execution, because a public sale of them would come within the prohibition of the act. And an attachment of such liquors, though made in due form, can confer upon the attaching officer no special property or right of possession, as his possession could only be for the purpose of an unlawful sale. Hence an attaching officer, though in the actual possession of such liquors, but claiming no rights in them except under the attachment, cannot, under the statutes in question, maintain an action for the forcible taking of them from his possession, even though such taking be by one having no right or authority.¹⁷ But in such a case, the attachment upon the liquors being void, the owner is not prevented from recovering them from the officer.¹⁸ And at common law, even where the liquors were held and intended for illegal sale, the owner may maintain trespass upon the unauthorized conversion of them by a sheriff.¹⁹ In Connecticut, under a statute similar to those we have been considering, it is held that the owner cannot maintain replevin for liquors which his agent was selling contrary to law, and which were levied on by a creditor of the agent.²⁰ And in Vermont, it is said that the right of stoppage *in transitu* cannot be enforced by suit as to intoxicating liquors sold contrary to law.²¹

§ 246. Mortgage of Liquors.

The validity of a chattel mortgage upon a stock or quantity of intoxicating liquor, presents a question of serious difficulty, and one which has not been uniformly decided by the courts. In the first

¹⁷ Nichols v. Valentine, 36 Me. 322.

¹⁸ Barron v. Arnold, 16 R. I. 22, 11 Atl. Rep. 298. Compare Oviatt v. Pond, 29 Conn. 479.

¹⁹ Hamilton v. Goding, 55 Me. 419. This case is not inconsistent with the rulings in Preston v. Drew, Lord v. Chadbourne, etc., cited above, because

it was decided under a later and much narrower statute, which limited the denial of a remedy to actions on claims or demands contracted or given for intoxicating liquor sold in violation of the act.

²⁰ Donohue v. Maloney, 49 Conn. 163.

²¹ Howe v. Stewart, 40 Vt. 145.

place, while a chattel mortgage is a species of security for a debt, it cannot be denied that it is also a conditional sale of the mortgaged property, and operates, when valid, to transfer the legal title to the mortgagee, to be defeated only by a full performance on the part of the mortgagor of all the conditions. Now in some states, all persons are forbidden to sell liquor, save for medical and mechanical purposes, and in others, all persons except those duly licensed. Hence, except in a very limited number of cases, it would appear that the conditional sale, by way of mortgage of such articles must be unlawful. Again, the mortgagee in a valid chattel mortgage has the right to sell the property upon condition broken. But if the mortgaged property consists of liquor, he could not, except under very exceptional circumstances, exercise this right. Therefore, for want of the means of enforcing its terms, the security seems to be a nullity. For these reasons, in some of the states, the courts have been led to hold that a mortgage of liquors is entirely void for all purposes.²² But in other jurisdictions, while the force of the foregoing arguments is not denied, it is still considered that such a mortgage must be held good as between the parties to it, and as against creditors of the mortgagor, (unless fraudulent,) and as possessing sufficient validity to sustain an action by the mortgagee against one taking the property from his possession without authority.²³ In the case cited from Massachusetts, it is said that even if the mortgage must be considered a sale, that does not in any degree affect the rights of the mortgagee. "Notwithstanding the statute, spirituous liquors are still property in this commonwealth. An action may be maintained against a wrong-doer who interferes with the possession or property of the owner. A sale, even when made under such circumstances as the law forbids, yet passes the property to the purchaser. The seller commits an offense for which he is punishable, but he does not retain his property in the article sold. It has never been held, under any of the statutes regulating the sale of spirituous or intoxicating liquors in this com-

²² *Korman v. Henry*, 32 Kans. 49, 3 Pac. Rep. 764; *Gerlach v. Skinner*, 34 Kans. 86, 8 Pac. Rep. 257; *Flersheim v. Cary*, 39 Kans. 178, 17 Pac. Rep. 825; *Hay v. Parker*, 55 Me. 355.

²³ *Cobb v. Farr*, 16 Gray, 597; *Bagg v. Jerome*, 7 Mich. 145. See *United States v. Distilled Spirits*, 5 Sawy. 421.

monwealth, that the purchaser was guilty of any offense or was *particeps criminis*. A mortgage is a sale, defeasible upon a condition, but it passes the title, subject to the right of redemption. As it is not criminal in the buyer to take an absolute title, we cannot see that it is criminal in him to take a defeasible title, or that he will fail to acquire all the rights of property which such a title usually gives."

§ 247. Insurance of Liquors.

A stock of intoxicating liquor, although illegally kept for sale, may nevertheless be lawfully insured against destruction or damage by fire.²⁴ It is true that policies insuring an illegal traffic are held void, as in the case of marine policies on unlawful voyages and insurances upon lottery tickets. But these cases are not parallel with the case we have supposed, because they rest upon the fact that in each instance it is made a necessary condition of the policy that the illegal act shall be done. If it were attempted to insure a person selling liquor against loss by fine or forfeiture, there would be a complete analogy between the cases, but not otherwise. When the property itself is insured, the risks insured against are not the consequences of illegal acts, but of accidents. "By insuring his property, the insurance company have no concern with the use he may make of it, and as it is susceptible of lawful uses, no one can be held to contract concerning it in an illegal manner, unless the contract itself is for a directly illegal purpose. Collateral contracts in which no illegal design enters, are not affected by an illegal transaction with which they may be remotely connected."²⁵

§ 248. No Recovery on Illegal Contract.

The course of our discussion now brings us to an examination of contracts directly connected with the sale or transfer of intoxicating liquors, and the effect upon them of statutes regulating or prohibit-

²⁴ Niagara Fire Ins. Co. v. De Graff, 12 Mich. 124; Carrigan v. Lycoming Fire Ins. Co., 53 Vt. 418, 38 Am. Rep.

687; Hinckley v. Germania Fire Ins. Co., 140 Mass. 38, 1 N. E. Rep. 737.

²⁵ Niagara Fire Ins. Co. v. De Graff, 12 Mich. 124.

ing the sale of such articles. And first it is necessary to advert to the general principles of law applicable to the subject. It may be stated, as a general rule, that contracts are void which are repugnant to justice, or founded upon an immoral consideration, or which are against the general policy of the common law, or contrary to the provisions of any statute, (even where such statute does not expressly declare them void, if it enacts a penalty for doing the act which constitutes the basis of the contract,) and that a party who is obliged to trace through such a contract his right to a debt alleged to be due him, cannot recover.²⁶ Even if the statute does not provide a penalty for the specific act, it is enough to invalidate the contract if the act is prohibited. "The fact that a thing is prohibited, if it be in the nature of a public wrong, makes its commission an offense, and in any view vitiates a contract for its performance."²⁷ The fundamental principle of public policy upon which this rule rests is expressed in the maxim, *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. "It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally at fault, *potior est conditio defendentis*."²⁸

§ 249. No Action for Price of Liquors Illegally Sold.

Applying the principles stated in the preceding section, we deduce the rule that, wherever the statute prohibits the sale of liquor except by a person holding a license or permit, or prohibits the sale altogether, a sale made by a person not so protected, or made under any other circumstances amounting to a violation of law, is void, and the seller cannot maintain an action against the purchaser for the price

²⁶ 2 Parsons, Contr. 673; 1 Wharton, Contr. § 363; Pollock, Contr. 253; Hare, Contr. 654; Bishop, Contr. § 547; 2

Benj. Sales, § 818; Melchoir v. McCarty, 31 Wis. 252.

²⁷ 1 Wharton, Contr. § 363.

²⁸ Holman v. Johnson, Cowp. 341.

or value.²⁹ "It is everywhere held that whenever an indictment can be sustained for the illegal sale of liquors or other goods, there the price cannot be recovered."³⁰ A party who sells liquor to a man, after being notified by the purchaser's wife not to make such sales, as provided by statute, cannot recover the price.³¹ And where the owner of liquor intrusts it to an agent, for the purpose of being sold by him in violation of law, the former cannot recover the proceeds of such sales in an action against the latter.³² On the same principle, a contract between the manufacturers of certain bitters, containing intoxicating liquor as the chief ingredient, (and therefore within the terms of the particular statute,) and a licensed liquor-dealer, whereby the latter is supplied with the bitters which he sells, with a warranty that they may be sold without a license, is contrary to public policy and void, and the manufacturers cannot maintain an action for the price.³³ So where liquor is sold to a druggist for the express purpose of enabling him to retail it as a beverage, in violation of law, the price cannot be recovered by suit, even though the sale itself was not illegal.³⁴ But where, as under some statutes, towns are authorized to sell spirituous liquors for certain purposes, this necessarily implies an authority to purchase them, for otherwise the law would be nugatory, and consequently an action will lie for the price.³⁵ And the fact that a town agent is made liable for purchasing liquors from any other person than the state agent, does not make the party selling *in pari delicto*, and the latter may recover of the town for the liquors so sold.³⁶ It is further to be observed that

²⁹ Griffith v. Wells, 3 Denio, 226; Cobb v. Billings, 23 Me. 470; Lewis v. Welch, 14 N. H. 294; Boutwell v. Foster, 24 Vt. 485; Bancroft v. Dumas, 21 Vt. 456; Briggs v. Campbell, 25 Vt. 704; Moog v. Espalla, (Ala.) 9 South. Rep. 596; Vannoy v. Patton, 5 B. Mon. 248; Dolson v. Hope, 7 Kans. 161; Alexander v. O'Donnell, 12 Kans. 608; Solomon v. Dreschler, 4 Minn. 278, (Gil. 197); Melchoir v. McCarty, 31 Wis. 252; Bach v. Smith, 2 Wash. Ter. 145, 3 Pac. Rep. 831. See Evans v. Hall, 45 Pa. St. 235.

³⁰ Jones v. Surprise, 64 N. H. 243, 9

Atl. Rep. 384, citing Bliss v. Brainard, 41 N. H. 256, 268; Smith v. Godfrey, 28 N. H. 384; Caldwell v. Wentworth, 14 N. H. 431; Lewis v. Welch, Id. 294; Pray v. Burbank, 10 N. H. 377.

³¹ Loranger v. Jardine, 56 Mich. 518, 23 N. W. Rep. 203.

³² Galligan v. Fannan, 7 Allen, 255.

³³ O'Bryan v. Fitzpatrick, 48 Ark. 487, 3 S. W. Rep. 527.

³⁴ Kohn v. Melcher, 43 Fed. Rep. 641.

³⁵ Kidder v. Knox, 48 Me. 551.

³⁶ Butler v. Northumberland, 50 N. H. 33. If the town agent was induced, by

the omission or neglect to comply with statutory conditions *after* a sale,—such as keeping a record of sales, or reporting them to designated officers,—though it may expose the seller to penalties, will not necessarily invalidate the sale so as to prevent a recovery.³⁷ And although the statute prohibits sales on Sunday, yet a recovery may be had on a promise made on a secular day, to pay for liquors sold on credit and delivered on Sunday, if the sale was otherwise lawful.³⁸

§ 250. Proof of Illegality of Sale.

In an action to recover the price of liquors sold, it is not incumbent upon the plaintiff, as a part of his case, to prove that he was duly authorized to make the sale, or that the sale was made in conformity to the restrictions of the law. Illegality, in such a case, is matter of defense. And if the defendant would escape liability on this ground, the burden is on him to allege and prove that the sale was contrary to law. The plaintiff, for example, is not required, in the first instance, to show that he has a license to sell, but the pleadings and evidence of the defendant must negative the existence of a license, if that is the ground of defense.³⁹ In some of the states, there is a statutory presumption, arising from the mere delivery of intoxicating liquor, that there was an unlawful sale. But this is limited to the cases for which it is specially provided, viz., criminal prosecutions. And therefore it is held that in an action for the rent of a tenement alleged by the defendant to have been knowingly let for the illegal sale of liquor, the plaintiff is entitled to have the jury instructed that the presumption of law is that sales of liquor made

false representations of the seller that he was a state agent, to purchase from him, the town, on discovery of the fraud, may rescind the contract, if done in a reasonable time, by offering to restore what they have received under it, or they may ratify and confirm the contract. *Id.*

³⁷ *Barnard v. Houghton*, 34 Vt. 264.

³⁸ *Melchoir v. McCarty*, 31 Wis. 252.

³⁹ *Kidder v. Norris*, 18 N. H. 532; *Olson v. Hurley*, 33 Minn. 39, 21 N. W.

Rep. 842; *Herlock v. Riser*, 1 McCord, 481. Where the defendant does not appear, plaintiff is entitled to recover, though he gives no evidence of a license. In a civil action, the question of license arises collaterally, and the license will be presumed until evidence to the contrary. Herein it differs from a criminal action, in which the license is the main part of defendant's case. *Smith v. Joyce*, 12 Barb. 21.

on the premises were lawful.⁴⁰ And by analogy, the same instruction would be proper in an action for the price of liquor so sold. When the defendant alleges that the liquor in question was sold to him in a county where the local option law was at the time in force, it is not enough for him to show that there was a contract to sell in that county, but he must also prove the actual consummation of the sale by the delivery of the goods there.⁴¹ If the illegality arose from the character or situation of the purchaser, this is also a matter which he may allege and prove. Thus, he may show that he himself was not authorized to sell liquor, that he bought the goods in question from the plaintiff for the purpose of retailing them, and that the plaintiff knew of this illegal purpose; and for the purpose of bringing home this knowledge to the plaintiff, he may give evidence of former similar transactions between them tending to show the plaintiff's connivance in his illegal course of business.⁴² Under a prohibitory liquor law, formerly in force in Michigan, it was provided that, to entitle the seller to recover, there must be "positive proof" that the liquors sold were imported from abroad and sold in the original packages. And it was held that this requirement was not sufficiently complied with, where an account was presented, opposite each item of which were added the words "imported and sold in the original packages," and the defendant admitted the correctness of the account.⁴³

§ 251. Entire and Divisible Accounts.

If the plaintiff's cause of action consists in part of a demand for the price of liquors illegally sold, his recovery will depend upon the question whether the contract or transaction sued on was entire or severable, and whether the consideration as a whole was tainted with illegality or was apportionable and partly good.⁴⁴ Where goods are

⁴⁰ *Jones v. McLeod*, 103 Mass. 58.

⁴¹ *Clohessy v. Roedelheim*, 99 Pa. St. 56.

⁴² *Briggs v. Rafferty*, 14 Gray, 525.

⁴³ *Niles v. Rhodes*, 7 Mich. 374.

⁴⁴ Dr. Wharton states and explains

the general rule as follows: "When there are several stipulations in a particular agreement, the fact that one of these stipulations is illegal does not defeat a recovery on the other, when the stipulations are divisible, and the con-

sold, the sale of a portion of which is prohibited by law, and the sale is not for a gross sum as the price of the whole, but at stipulated prices for the prohibited goods and stipulated prices for the residue, the illegality of the sale of the portion prohibited will not render the sale of the residue illegal.⁴⁵ Thus, where an entire stock of goods is sold at one and the same time, but each article at a separate and distinct agreed value, the contract of sale is not to be regarded as entire and indivisible, and if the sale of some of the articles be prohibited by law, the illegality will not vitiate the sale of the other articles.⁴⁶ On the other hand, if the sale of a stock of goods is entire and for a gross sum, and it embraces liquors which the vendor was not authorized to sell, the whole sale is void.⁴⁷ So, if intoxicating liquors are illegally sold, with an agreement that the vessels containing them, which are sold at the same time, may be returned and the buyer credited with the price charged, no action can be maintained for the price of the vessels not returned.⁴⁸ In a case in Pennsylvania, the keeper of a boarding-house, not having a license to sell liquor, rendered a bill to a boarder, including an item for liquor, but this item was afterwards withdrawn, and a suit commenced for the board only; and it was thereupon held that the plaintiff might recover.⁴⁹ Where an auditor, examining a book account for "goods and medicine," finds that some of the charges were for

sideration is not as a whole illegal. In other words, 'in cases where the consideration is tainted by no illegality, but some of the conditions or promises are illegal, the illegality of those which are bad does not communicate itself to or contaminate those which are good, except where, in consequence of some peculiarity in the contract, its parts are inseparable or dependent upon one another.' Smith's L. C., (7th Am. Ed.) 681. *A fo tiori*, when a transaction is separated by the parties into two agreements, one legal and the other illegal, the legal agreement can be enforced, and the transaction *pro tanto* sustained. It is otherwise where the stipulations, legal and illegal, are so interwoven that

the legal cannot be sustained without sustaining the illegal. 'The general rule is, that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part, and retain the good.' Willes, J., in *Pickering v. Railroad Co.*, L. R. 3 C. P. 250." 1 Wharton, Contr. § 338.

⁴⁵ Walker v. Lovell, 28 N. H. 138.

⁴⁶ Carleton v. Woods, 28 N. H. 290.

⁴⁷ Ladd v. Dillingham, 34 Me. 316.

⁴⁸ Holt v. O'Brien, 15 Gray, 311.

⁴⁹ Chase v. Burkholder, 18 Pa. St. 48.
And see Fowle v. Blake, 38 Me. 528;
Cochrane v. Clough, Id. 25.

liquors illegally sold, but cannot determine what part, the burden is then on the plaintiff to prove the validity and propriety of each item.⁵⁰

§ 252. Appropriation of Payments on Account Partly Illegal.

Payments made generally on an account composed of items of debts, some of which are legal and some illegal, are first applied, by the law, to the items of legal debts due.⁵¹ But this rule does not derogate from the right of the parties to make such a specific appropriation as they may choose. Thus, where an account consisted in part of charges for liquors sold in violation of law, and there were payments credited on the account, and it had been agreed between the parties that the payments as they were made should be applied first upon the charges for liquors sold, it was held that, though the agreement was void, and though the amount paid for the liquors could be recovered back in an action upon the statute in that behalf, yet so far as the payments had been already so applied under the agreement, they could not be diverted from that application and appropriated to the other items of the account. For such action by the court would be in effect to "make a new contract for the parties against their wishes and intentions."⁵²

§ 253. Recovery on Liquor Contract by Award.

Although one who sells liquor in violation of law cannot maintain an action for the price, yet it is said to be no sufficient objection to an award of arbitrators that the party objecting is thereby charged with the price of liquors illegally sold. The supreme court of New Hampshire, in making this decision, observed that "if the suit were upon the note, or upon the other claims, in a court of law, the defendant might object that the sale of the articles which formed the con-

⁵⁰ Graves v. Ranger, 52 Vt. 424.

⁵² Tomlinson Carriage Co. v. Kinsella,

⁵¹ Dunbar v. Garrity, 58 N. H. 575; 31 Conn. 268. And see Plummer v. Solomon v. Deschler, 4 Minn. 278. (Gil. Erskine, 58 Me. 59. 197.)

sideration of the note, and the ground of the other claims, was prohibited by statute, and could not furnish the foundation of a judgment. The rule would then apply that a party cannot be heard in a court of justice who bases his right to recover upon the violation of the law; and this is irrespective altogether of the question whether the violated law be founded upon morals, or be merely a municipal regulation, for the laws of either class are, by the later decisions, regarded alike in this particular. But the parties have elected their own tribunal. They have chosen to submit the controversy to a tribunal which was at liberty to disregard the law, and make its own view of the equity between the parties the guide in its decision."⁵³

§ 254. Revival of Right of Action by Repeal of Law.

The subsequent repeal of an act prohibiting the sale of intoxicating liquors can have no effect to give a right of action on a contract made in contravention of the statute while it was in force.⁵⁴ But in respect to the right of action, after the repeal of a statute forbidding actions on liquor contracts, or invalidating notes or other securities given in connection with such contracts, there is an important distinction, founded on the question whether the prohibiting statute merely provided that *no recovery* should be had on such engagements or contracts, or declared that such contracts, and securities given in pursuance of them, should be absolutely *void*. In the latter case, there can of course be no right of action after the repeal, because that which was by law an absolute nullity cannot be vivified by the repeal of the law. But in the former case, the prohibition, not going to the contract itself, but merely withholding a remedy, is removed, in this respect, by the repeal of the statute.⁵⁵

§ 255. Laws Forbidding Credit for Liquor Sold.

In some of the states, statutes have been enacted forbidding tavern-keepers or other dealers in intoxicating liquors to sell the same

⁵³ Davis v. Wentworth, 17 N. H. 567.

⁵⁴ Hathaway v. Moran, 44 Me. 67. Nor can such contract support a new prom-

ise made after the repeal of the law. Ludlow v. Hardy, 38 Mich. 690.

⁵⁵ Bird v. Fake, 1 Pin. (Wis.) 290; Gorsuth v. Butterfield, 2 Wis. 287.

to any person on credit, beyond a designated small amount. Such a law prevents the maintenance of an action for the recovery of the price of liquors sold, except in the statutory amount. Thus, in Illinois, where a plaintiff's account is for spirituous liquors sold in less quantities than a quart, the entire claim, exceeding fifty cents, is made void by statute, and a recovery on it expressly prohibited. And where a due-bill is given for such liquors, sold in less quantities than a quart, no recovery can be had on the same, except as to fifty cents.⁵⁶

§ 256. Note Given on Illegal Sale of Liquor is Void.

No action can be maintained upon a promissory note given for the price of intoxicating liquors sold by the payee in violation of law.⁵⁷ And it can make no difference that the vendor sold the liquors on a month's credit, and that the note was not given until the end of the month, and was then given on an extension of the time for payment, nor is the case altered by the fact that the note was dated as of a place in another state, (being in fact executed in the state where the sale was made,) and was made payable at a named bank in such place.⁵⁸ And so, where intoxicating liquors are sold in a state where the sale is illegal and void by the law of the state, and the sale is made for the purpose of enabling the buyer to violate the law of that state, an action brought in another state, against the acceptor of a note given for the price of the liquors, cannot be sustained.⁵⁹ And where the buyer, having given his notes for the price of the illegal sale, afterwards pays part of the notes to a bank where the seller procured a discount of them with his own indorsement, and the rest to the seller himself, he may recover from the seller, in an action on the statute, the amount actually received by him on the notes both from the bank and from the plaintiff.⁶⁰ But in order to invalidate the note, it is necessary that its consideration should be directly connected

⁵⁶ Sappington v. Carter, 67 Ill. 482.
See, also, Brittain v. Bethany, 31 Miss. 331.

⁵⁷ Turck v. Richmond, 13 Barb. 533;
Glass v. Alt, 17 Kans. 444.

⁵⁸ Glass v. Alt, 17 Kans. 444.

⁵⁹ Weil v. Golden, 141 Mass. 364, 6 N. E. Rep. 229; Converse v. Foster, 32 Vt. 828.

⁶⁰ Orcutt v. Symonds, 107 Mass. 382.

with the unlawful sale, and not collaterally only. Thus, where the sale of intoxicating liquor is illegal, it is no defense to a promissory note that the maker bought liquor from one who was indebted to the payee for rent, and, in payment for the liquor, assumed the debt for rent owing by the seller to the payee of the note, and executed the note therefor; because, in this case, the consideration of the note is the rent, and not the liquor.⁶¹

§ 257. Proof of Illegality of Note.

Where a plaintiff's cause of action is upon a promissory note, (which imports consideration,) the burden is upon the defendant to show by proof the illegality of the contract, that constituting his defense to the action.⁶² If, under the statute, *all* sales of liquor within the state are illegal, he will establish his defense by merely proving that the consideration of the note was the price of liquors sold in the state. But where the statute contains exceptions,—as, authorizing sales by persons holding licenses or permits, or allowing manufacturers to sell for exportation only,—then the burden is upon the defendant to satisfy the jury, by direct or circumstantial evidence, that the plaintiff is not within the excepted classes, or that the sale was not made for the excepted purposes.⁶³ And if the illegality of the sale arises from the fact that the purchaser belonged to a class of persons to whom it is forbidden to sell, it is incumbent on him to establish this fact in defense. Where the defense is that the notes sued on were given for liquor sold to defendant at a time when he was, to the plaintiff's knowledge, a man of "known intemperate habits," evidence that defendant's general reputation was that of a man of intemperate habits, though not competent to prove the fact of such habits, is competent to show the plaintiff's knowledge.⁶⁴ It must be observed, however, that the common law rule in this regard has been changed by statute in some of the states, so that it is now incumbent upon the payee of

⁶¹ Bowen v. Webber, 69 Iowa, 286, 28 N. W. Rep. 600.

⁶³ Craig v. Proctor, 6 R. I. 547.

⁶² Craig v. Proctor, 6 R. I. 547; Brigham v. Potter, 14 Gray, 522.

⁶⁴ Collins v. Jones, 83 Ala. 365, 3 South. Rep. 591.

a note given for liquors to establish affirmatively the validity of the sale which constitutes the consideration.⁶⁵

§ 258. Consideration of Note Illegal in Part.

It is well settled upon the authorities, that if a promissory note is given in settlement of an account, of which some of the items are for intoxicating liquors sold by the payee to the maker in violation of law, the illegal part of the consideration cannot be separated from the legal, but taints the whole, and, as between the immediate parties and those taking with notice, the entire note is void.⁶⁶ The reason of this rule is explained by the supreme court of Ohio as follows: "Whilst a partial want or failure of consideration avoids a bill or note only *pro tanto*, illegality in respect to the consideration avoids it *in toto*. The reason of this distinction is said to be founded, partly at least, on grounds of public policy, and partly on the technical notion that the security is entire and cannot be apportioned; and it has been said with much force, that where parties have woven a web of fraud or wrong, it is no part of the duty of courts of justice to unravel the threads, and separate the sound from the unsound. And, in general, it makes no difference as to the effect, whether the illegality be at common law or by statute."⁶⁷ And on the same principle, if partial payments have been made on an account, less than the amount charged therein for liquor illegally sold, a note given for the balance is void.⁶⁸

§ 259. Rights of Innocent Holder for Value.

In accordance with well settled and acknowledged rules of law governing commercial paper, it is held that it is no defense to an action on a negotiable promissory note that it was given in whole or in part for the price of intoxicating liquors sold in violation of law,

⁶⁵ Doolittle v. Lyman, 44 N. H. 608; Brigham v. Potter, 14 Gray, 522.

⁶⁶ Widoe v. Webb, 20 Ohio St. 431; Coburn v. Odell, 30 N. H. 540; Kidder v. Blake, 45 N. H. 530; Braitch v. Gue-

lick, 37 Iowa, 212; Deering v. Chapman, 22 Me. 488.

⁶⁷ Widoe v. Webb, 20 Ohio St. 431.

⁶⁸ Deering v. Chapman, 22 Me. 488.

when the action is brought by an innocent holder, who received the note in due course of business, for a valuable consideration, and without notice of the illegality of the consideration.⁶⁹ "The law extends this peculiar protection to negotiable instruments, because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having a bill or note passed to him impeached for some covert defect."⁷⁰ And this rule has been extended so far as to hold that a note, given upon an illegal sale of liquor, and discounted in good faith by a party without notice of the illegality, may be collected by a holder who purchased it from such party, although the holder himself, at the time he bought the note, knew of the illegality.⁷¹ There is, however, an exception to this rule which must here be noticed. It has been expressed as follows: "When a statute, expressly or by necessary implication, declares the instrument absolutely void, it gathers no vitality by its circulation, in respect to the parties executing it; though, even upon such instruments, an indorser may be held liable to a *bona fide* holder without notice."⁷² Thus, the statute in Vermont provides that "no action shall be had or maintained in any court in this state, for the recovery or possession of intoxicating liquor, or the value thereof, except such as is sold or purchased in accordance with the provisions of this chapter." And this, it is held, renders a note given for liquor, not so sold or purchased, absolutely void, so that a *bona fide* holder thereof for value and without notice cannot recover upon it.⁷³ But where, as in Rhode Island, the statute does not declare liquor con-

⁶⁹ Hapgood v. Needham, 59 Me. 442; Field v. Tibbetts, 57 Me. 358; Baxter v. Ellis, Id. 178; Norris v. Langley, 19 N. H. 423; Doe v. Burnham, 31 N. H. 426; Great Falls Bank v. Farmington, 41 N. H. 32; Pindar v. Barlow, 31 Vt. 529; Johnson v. Meeker, 1 Wis. 436; 1 Wharton, Contr. § 351.

⁷⁰ 1 Daniel, Nego. Instr. § 197.

⁷¹ Dillingham v. Blood, 66 Me. 140. This decision proceeds upon the ground that the holder succeeds to all the rights of the person who discounted the note. And again, the maker is not

injured, because the discounter could have enforced it, and it must be immaterial to the maker whether it is enforced by A. or B. And besides, in analogous cases, the rule has been held in the same way; *e. g.*, where the plaintiff knows that the note was fraudulently obtained by the payee, but bought it from a prior holder against whom this defense could not be set up.

⁷² 1 Daniel, Nego. Instr. § 197.

⁷³ Streit v. Sanborn, 47 Vt. 702, construing Gen. St. Vt. c. 94, § 32.

tracts void, but enacts that payments and compensations made upon such contracts shall be deemed to be without consideration as between the original parties, this does not impair the settled rights of a *bona fide* holder of negotiable paper.⁷⁴

§ 260. Proof of Character of Holder.

It may be stated, as a general rule, that when, in an action by an indorsee against the maker of a promissory note, the defendant has proved that the note was given for intoxicating liquor sold in violation of law, the plaintiff cannot recover until he shows that he was a holder for a valuable consideration without notice of the illegality of the contract.⁷⁵ But when he has shown that he purchased the note for value, in due course of business, and under circumstances not calculated to awaken suspicion, it will be presumed that he had no notice of the illegality, until the contrary is shown.⁷⁶ And a purchaser of negotiable paper is not put upon inquiry, by mere knowledge that the payee is engaged in selling liquor, to ascertain whether the consideration of the paper was not the unlawful sale of liquor.⁷⁷

§ 261. Purchaser of Note after Maturity.

As a rule, overdue commercial paper is subject, in the hands of all parties dealing with it, to defenses growing out of the infirmity of its consideration. Hence where a negotiable note, which is void as between the original parties, by reason of being given for the price of liquor sold contrary to law, is transferred to a stranger *after maturity*, it is void in his hands, although he paid value for it and had no notice of the illegality.⁷⁸ But this rule may be varied somewhat by the terms of particular statutes. Thus, in Maine, the statute provides that the defense of illegality in the consideration of a note, which was given for the price of liquors illegally sold, "shall not

⁷⁴ Cobb v. Doyle, 7 R. I. 550.

⁷⁷ Bottomley v. Goldsmith, 33 Mich.

⁷⁵ Cottle v. Cleaves, 70 Me. 256; Rock Island Nat. Bk. v. Nelson, 41 Iowa, 563.

27.

⁷⁶ Swett v. Hooper, 62 Me. 54; Baxter v. Ellis, 57 Me. 178.

⁷⁸ Bissell v. Gowdy, 31 Conn. 47; Barlow v. Scott's Admr., 12 Iowa, 63.

extend to negotiable paper in the hands of any holder for a valuable consideration and without notice of the illegality of the contract." And it is held that the fact that the note was overdue when negotiated will not be sufficient to subject it to the defense of illegality on this ground, as this, under the statute, does not amount to notice of its defective consideration.⁷⁹

§ 262. Judgment for Price of Liquors Sold.

If there is illegality in a plaintiff's cause of action, this is matter which must be interposed in defense to the suit. If a judgment is rendered on such a cause of action, it is not open to collateral impeachment, nor can its merits be inquired into in a subsequent suit, although the illegality of the contract may, in some cases, furnish ground for vacating or enjoining the judgment in a proper proceeding.⁸⁰ In Iowa, where the code provides that all sales, liens, pledges, etc., made on account of intoxicating liquors, shall be void, it is held that the word "lien" does not include the lien of a judgment. And if a judgment be rendered in favor of a party selling liquors, it cannot be pleaded in another action that such judgment is void because the subject-matter of the action comes within the prohibition of the statute.⁸¹

§ 263. Money Paid for Liquor cannot be Recovered Back at Common Law.

Although the vendor, in an illegal sale of liquor, cannot maintain an action for the price, yet if the purchaser voluntarily pays the money, the contract is executed, and the rights of the parties are not subject to further change, without the aid of a statute. "When a contract, not *malum in se*, made in violation of the provisions of a statute, has been executed, a party who has performed, by the payment of money, cannot recover it back, unless he can show that it was not paid for value actually received, but was obtained wrongfully

⁷⁹ Field v. Tibbetts, 57 Me. 358.

⁸¹ Smith v. Leddy, 50 Iowa, 112.

⁸⁰ 1 Black, Judgm. §§ 331, 379.

or by undue advantage, or unless he can exhibit a statute provision expressly authorizing such a recovery. By the common law, therefore, a person who has purchased intoxicating liquors of one not licensed to sell them, and who has received and paid for such liquors, could not recover back the money so paid."⁸² On this principle, where the statute prohibits the giving of credit beyond a certain amount for liquor sold at retail, this does not apply to the payment of a judgment by means of such an account; the statute restricts the enforcement of such account, beyond the designated amount, but does not authorize the recovery back of money paid upon it.⁸³ And so, where a mortgage of goods, void because made to secure the price of liquors sold contrary to law, was foreclosed by a court having jurisdiction, and a decree passed ordering a public sale of the goods by an officer, to an amount sufficient to pay the mortgage debt, and an officer sold the goods pursuant to the order, and paid over the amount of the debt to the mortgagee, it was held that the officer was not liable for the amount of the sale to a party who had acquired, previous to the foreclosure, a valid title to the goods from the mortgagor.⁸⁴ A garnishee is not permitted to deduct, out of the effects and credits in his hands, a demand against the principal defendant for money paid on the illegal sale of intoxicating liquor.⁸⁵

§ 264. Executory Contract may be Repudiated.

It has been observed by a leading writer that "where money has been paid on an illegal consideration, it may be recovered back at any time while the contract is still unexecuted, by repudiating the agreement, supposing that the plaintiff is not using the process of the court as a criminal venture. . . . The reason is, that in such cases the plaintiff's claim is not to enforce, but to repudiate, an illegal contract. The object of the suit is not to get paid for some-

⁸² Ellsworth v. Mitchell, 31 Me. 247, citing Lowry v. Bordien, Doug. 468; Tappenden v. Randall, 2 Bos. & Pul. 467; White v. Franklin Bank, 22 Pick.

181. And see Mudgett v. Morton, 60 Me. 260; 1 Wharton, Contr. §§ 336, 352.

⁸³ Smith v. Hickman, 68 Ill. 314.

⁸⁴ Carter v. Clark, 28 Conn. 512.

⁸⁵ Thayer v. Partridge, 47 Vt. 423.

thing illegally done, but to prevent the defendant from using an illegal pretext to retain money unlawfully detained.”⁸⁶ Hence, in an action to recover the value of goods exchanged for intoxicating liquors in violation of law, the plaintiff may treat the contract of exchange as void, and if it is set up as a valid defense, he may then show that it falls within the statutory prohibition.⁸⁷

§ 265. Statutory Action to Recover Back Payments on Liquor Contracts.

In several of the states, as a means of discouraging illicit traffic in liquor, statutes have been enacted providing that all “payments and compensations for intoxicating liquors sold in violation of the statute shall be held to have been received in violation of law, and against equity and good conscience, and to have been received upon a valid promise and agreement of the receiver, in consideration of the receipt thereof, to pay, on demand, to the person furnishing such consideration, the amount of said money.”⁸⁸ From what we have already said, it will be seen that these acts afford a right of action not available at the common law. A regulation of this character, it is held, is not such an interference with interstate commerce as to conflict with the federal constitution; for although it restricts the sale of a recognized article of property, it is legislation enacted merely in virtue of the police power, and only indirectly affects the commerce of the country.⁸⁹ Under these statutes, a plaintiff, though he is himself licensed to sell liquor, may recover back payments made to a manufacturer who has no authority to sell.⁹⁰ And if a licensed retailer sells at wholesale, the purchaser may recover the price paid.⁹¹ But the acts do not apply to payments on a sale of liquor for “mechanical, medicinal, and sacramental purposes,” allowed by the statute, on the part of citizens of the state, although the sale was invalid by reason of the fact that the seller was a citizen of another state.⁹²

⁸⁶ 1 Wharton, Contr. § 354.

⁸⁷ Smith v. Grable, 14 Iowa, 429.

⁸⁸ Code Iowa, § 1550; Gen. St. R. I. c. 79, § 54.

⁸⁹ Connolly v. Scarr, 72 Iowa, 233, 33 N. W. Rep. 641.

⁹⁰ Becker v. Betten, 39 Iowa, 663.

⁹¹ Tobert v. Clough, 72 Iowa, 220, 33 N. W. Rep. 639.

⁹² Kohn v. Melcher, 29 Fed. Rep. 433.

And an agent, who sells in violation of the law, but does not receive the price, is not liable.⁹³ Further, the statute is aimed at sales in the ordinary sense of the term, where the title passes from one owner to a new and different one, and not to releases on the dissolution of a partnership. Accordingly, where one partner buys the other out, he cannot, under the statute, recover back the money paid.⁹⁴ If a single payment in money is made for a stock in trade, only a part of which consisted of liquor, it is held that the purchaser may recover the proportional amount paid for the liquor.⁹⁵ But if the statute allows the recovery of all "payments or compensation" for intoxicating liquor, this does not enable a purchaser who gave his note for the goods to maintain an action, until he has paid such note. The giving of a note to the seller does not amount to a payment, and the fact that the note was transferred to a third party by the seller, and is still outstanding, does not change the rule.⁹⁶ An action cannot be brought, under these statutes, without first making a demand for the money.⁹⁷ But the amount of the payment may be pleaded as a set-off or counter-claim, as well as recovered directly by suit.⁹⁸ The right of action given by these statutes, so it is held, is a vested right in all persons who have paid money on such illegal sales, and is not affected by subsequent changes in the law.⁹⁹ And the action thereunder is barred only at the end of the same period which would bar a valid promise or agreement to pay the money in question; it is not a penal action such as is barred in two years.¹⁰⁰ In such an action, when the contract of sale was entered into within the state, the presumption is that payment was intended to be made, and was in fact made, in the state, in the absence of evidence to the contrary.¹⁰¹

⁹³ Schober v. Rosenfield, 75 Iowa, 455, 39 N. W. Rep. 706.

⁹⁴ Jacobs v. Stokes, 12 Mich. 381.

⁹⁵ McGuinness v. Bligh, 11 R. I. 94.

⁹⁶ Carlin v. Heller, 34 Iowa, 256.

⁹⁷ Schober v. Rosenfield, 75 Iowa, 455, 39 N. W. Rep. 706.

⁹⁸ Tolman v. Johnson, 43 Iowa, 127.

⁹⁹ Peters v. Goulden, 27 Mich. 171.

¹⁰⁰ Woodward v. Squires, 41 Iowa, 677.

¹⁰¹ Connolly v. Scarr, 72 Iowa, 223, 33 N. W. Rep. 641.

§ 266 Recovery for Liquors Sold in Another State.

A contract made in one state for the sale of liquors to be delivered in another state, such as would be valid at common law, and which is not shown to be invalid where made, will enable the seller to maintain an action for the price in the state where the delivery is made, notwithstanding that, if made in the latter state, the contract would have been void.¹⁰² The single exception to this rule is in a case where the seller knew that the purchaser intended to make an illegal disposition of the goods, and in some way abetted or participated in the unlawful enterprise.¹⁰³ Of this point we shall have occasion to speak more fully in subsequent sections. But illegality will not be presumed, nor will it be presumed, as against the validity of a contract, and in the absence of proof, that the statutes of another state have provisions similar to those of the state where the action is brought, and in derogation of the common law. Neither will it be presumed, in the absence of evidence or finding, that parties making a sale in another state, where it was presumably valid, of liquors to be transported into the state of the forum, intended thereby to assist the purchaser in violating the laws of the latter state.¹⁰⁴ A sale, for exam-

¹⁰² *Roethke v. Philip Best Brewing Co.*, 33 Mich. 340; *Wagner v. Breed*, (Nebr.) 46 N. W. Rep. 286; *Hill v. Spear*, 50 N. H. 253; *Webber v. Donnelly*, 33 Mich. 469; *Kling v. Fries*, 33 Mich. 275; *Orcutt v. Nelson*, 1 Gray, 536; *Mona-ghan v. Reid*, 40 Mich. 665.

¹⁰³ In this connection, the court in Iowa remarks that the rule that a contract good where made is good everywhere "is subject to important exceptions: 1. That neither the state nor its citizens may suffer any injury or inconvenience by giving legal effect to the contract, which should not, in itself, nor in the means used to give it effect, work any injury to the country where it is attempted to be enforced. Story, *Conf. Laws*, § 244. 2. That the consideration of the contract be not immoral, and the giving effect to it will

not have a bad tendency, or exhibit to the citizens of the state an example pernicious and detestable. No man ought to be heard in a court of justice to enforce a contract founded in, or arising out of, moral or political turpitude, or in fraud of the just rights of any foreign nation. 3. The contract must not be opposed to the policy and institutions of the state where it is sought to be enforced. In all such cases, the contracts will be held utterly void, whatever may be their validity in the country where they are made, as being inconsistent with the duties, the policy, or the institutions of the state where they are sought to be enforced. Story, *Conf. Laws*, § 259." *Davis v. Bronson*, 6 Iowa, 410.

¹⁰⁴ *Kling v. Fries*, 33 Mich. 275.

ple, to a town agent by a non-resident dealer is not illegal, and the vendor is not responsible for the intent with which the agent purchased, nor the use to which he puts the liquor sold.¹⁰⁵ And even where the statute prohibits recovery of the price of any liquors "except such as are sold or purchased in accordance with the provisions of the act," a sale of liquors made elsewhere, to be delivered within the state, if made without any view to their illegal resale, is valid; for, in the contemplation of the law, all sales are made in accordance with the act, if they are not prohibited by the terms of the act, or by necessary implication from those terms.¹⁰⁶ And if a sale in another state is valid, a note for the price, given in the state where the goods are to be delivered, is valid and binding.¹⁰⁷

§ 267. Determination of Place of Sale.

It frequently becomes important to localize a sale of liquors, in order to determine whether the transaction must be regarded as taking place in a foreign state, where it would be lawful, or in the state of the forum, where it would be illegal. Many elements may enter into the determination of this question, but those most important to be considered are the place where the order was given, the place where delivery is made, and the character of the sale, as final or conditional. In some of the states, it is held that if the order for the goods is taken by the vendor himself in the state of the forum and delivery made there, it is a contract of that state, though the goods are packed and shipped from abroad.¹⁰⁸ But there are also numerous authorities which hold that, although the order may be given in the state of the purchaser, yet if the seller, residing and doing business in another state, there delivers the liquors to a common carrier for transportation to the purchaser, and it does not appear that the order was for any specific liquors, (*i. e.*, such as would ascertain the individual article sold without more,) these facts show only an executory contract of sale, made in the state of the purchaser, but com-

¹⁰⁵ *Street v. Hall*, 29 Vt. 165.

¹⁰⁶ *Orcutt v. Nelson*, 1 Gray. 536.

¹⁰⁷ *Monaghan v. Reid*, 40 Mich. 665.

¹⁰⁸ *Webber v. Howe*, 36 Mich. 150;

Territt v. Bartlett, 21 Vt. 184; *Keiwert*

v. Meyer, 62 Ind. 587.

pleted in the foreign state.¹⁰⁹ Of course, if the order is sent by the purchaser by mail, it is regarded as given at the place where it is received, and then all the elements of the transaction are complete in the foreign state, including delivery, if made to a common carrier.¹¹⁰ The place of delivery is not always the controlling element in these questions. Thus, where the plaintiff made an agreement, in Boston, for the sale of liquors belonging to him, which were stored in Concord, with an agent of the defendant, and the terms of the agreement were complied with, it was held that, as between the vendor and vendee, the title to the property passed without proof of a delivery, and that the sale was complete in Boston, and hence not subject to the laws of New Hampshire.¹¹¹ But if the sale does not become complete, by reason of an option to return the goods if not satisfactory, until the liquors reach the buyer's hands, then, notwithstanding the foreign residence of the vendor, the transaction is regarded as localized in the state of the purchaser.¹¹² But if the contract gives the buyer the period of thirty days to see if the goods are as represented, with the right to return them if they do not correspond to representations, this alone does not make the sale conditional, so as to prevent its being complete in the foreign state.¹¹³ In a case in Nebraska, it appeared that, by a certain writing, plaintiff agreed to sell beer made by him to defendant, to be sold by the latter in Nebraska, and that he would sell to no other person for sale there, and to give defendant credit for the same in a designated amount. Defendant agreed to "faithfully represent" the plaintiff, and "to act as his agent for the sale of his beer," and then, by the same instrument, mortgaged certain lots to secure him for credits to be given under the arrangement. It was held that this was not a contract of agency or of sale, and did not operate to localize and render void sales of beer afterwards made in another state, and valid there, but which were contrary to the laws of Nebraska.¹¹⁴

¹⁰⁹ *Arberger v. Marrin*, 102 Mass. 70; *Dolan v. Green*, 110 Mass. 322; *Boothby v. Plaisted*, 51 N. H. 436; *Schlesinger v. Stratton*, 9 R. I. 578; *Erwin v. Stafford*, 45 Vt. 390; *Backman v. Mussey*, 31 Vt. 547.

¹¹⁰ *Webber v. Donnelly*, 33 Mich. 469.

¹¹¹ *Felton v. Fuller*, 29 N. H. 121. But see *Myers v. Carr*, 12 Mich. 68.

¹¹² *Wilson v. Stratton*, 47 Me. 120.

¹¹³ *Schlesinger v. Stratton*, 9 R. I. 578; *Mack v. Lee*, 13 R. I. 293.

¹¹⁴ *Wagner v. Breed*, (Nebr.) 46 N. W. Rep. 286.

§ 268. Same; Agent Taking Order.

It is generally held that where a person living and doing business in one state sends his agent into another state to solicit orders for goods, and the agent there takes orders and sends them to his principal's place of business, and the latter fills the orders, and, without any special arrangement as to the manner and place of delivery, delivers them to a carrier in his own state, to be transported at the expense of the purchaser to the latter's place, the place of sale is in the state where the agent's principal does business.¹¹⁵ In some of the cases, however, we find a rule applied that the sale is made at the place where the agent takes the order, if the agent's action is final and binding on the principal; but otherwise if the order is to be subject to the principal's approval before it is filled.¹¹⁶ A purchaser by sample has the right, independent of any express agreement, to refuse to receive the goods offered if they fail to correspond with the sample. Hence, where liquors are sold by a wholesale dealer in one state, through his agent, to a party in another state, the fact that such right is by express agreement reserved to the purchaser, does not change the locality of the contract.¹¹⁷ But no recovery can be had for liquors sold by a merchant in another state to a person residing in the state of the forum, in pursuance of a contract made, or orders sent, by an agent of the seller, in the latter state, who had notice at the time that the liquor was to be sold in the latter state contrary to its laws; because, in such a case, the vendor must be regarded as aiding and participating in the violation of the laws of such state.¹¹⁸

§ 269. Knowledge of Buyer's Illegal Purpose not Sufficient to Prevent Recovery.

Where a sale of liquor is made in one state, and is valid there, the vendor may maintain an action to recover the price in another

¹¹⁵ *Williams v. Feiniman*, 14 Kans. N. W. Rep. 514; *Tegler v. Shipman*, 33 288; *McCarty v. Gordon*, 16 Kans. 35; Iowa, 194.

Snider v. Koehler, 17 Kans. 432; *Fuller v. Leet*, 59 N. H. 163. ¹¹⁷ *Gill v. Kaufman*, 16 Kans. 571; *McCarty v. Gordon*, Id. 35; *Snider v. Koehler*, 17 Kans. 432.

¹¹⁶ *Taylor v. Pickett*, 52 Iowa, 467, 3

¹¹⁸ *McConihe v. McMann*, 27 Vt. 95.

state, where the purchaser resides and where the goods were delivered, notwithstanding it was the intention of the purchaser to make an illegal use of the property,—as by reselling it contrary to the laws of his own state,—provided the seller did not in any way aid or participate in the unlawful design. And *mere knowledge*, on the seller's part, of the buyer's illegal purpose, will not be sufficient to defeat a recovery.¹¹⁹ The principle is illustrated by the rule applicable to the analogous case of goods purchased abroad and smuggled into the country. Here the true distinction is pointed out as follows: Where the foreign vendor takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels, or otherwise, the contract of sale will not be enforced; but the mere sale of goods by a foreigner in a foreign country, made with the knowledge that the buyer intends to smuggle them into his own country, is not illegal, and may be enforced.¹²⁰ In the state of Iowa, while it is not held that

¹¹⁹ *Banchor v. Mansel*, 47 Me. 58; *Gassett v. Godfrey*, 26 N. H. 415; *Lauten v. Rowan*, 59 N. H. 215; *Fisher v. Lord*, 63 N. H. 514, 3 Atl. Rep. 927; *Backman v. Wright*, 27 Vt. 187; *Gaylord v. Soragen*, 33 Vt. 110; *Tuttle v. Holland*, 43 Vt. 542; *Erwin v. Stafford*, 45 Vt. 390; *Dater v. Earl*, 3 Gray, 482; *Kreiss v. Seligman*, 8 Barb. 439; *Feineman v. Sachs*, 33 Kans. 621, 7 Pac. Rep. 222; *Whitlock v. Workman*, 15 Iowa, 351; *Second Nat. Bk. v. Curren*, 36 Iowa, 555; *Webber v. Donnelly*, 33 Mich. 469; *Hodgson v. Temple*, 5 Taunt. 181; 2 Benj. Sales, § 791. Compare *Fishel v. Bennett*, 56 Conn. 40, 12 Atl. Rep. 102. In this connection we quote the following from Dr. Wharton's work on Contracts, (§ 343:) "It may be that a knowledge of the intention of the party supplied to use the supplies illegally is essential to put the party supplying in the position of a *particeps criminis*. But the mere knowledge of such intention will not by itself suffice for this purpose. The unlawful intention must have been in some sense executed. *Cogitationis poenam nemo patitur*. There must be a union of purposes between the party

supplying and the party supplied, in order to infect the former with the latter's criminality. A money-lender may know that the person to whom he lends money intends to spend this money in gambling or in the purchase of illegal stimulants, but this will not prohibit his recovery in a suit on the loan. A capitalist may know that it is the intention of a foreign government, with whom he is negotiating a loan, to apply the money borrowed to belligerent purposes; but this knowledge, if war has not yet broken out, does not infect the lender with complicity. The lender of money on a mortgage on a store is not precluded from recovering it by the fact that he knows the mortgagor intends to open gambling tables, or to store prohibited drugs on the premises. It is not enough, therefore, in order to establish such complicity as defeats a right to recover in such cases, that the party supplying the goods or money knows that the party supplied intends to use them for an illegal purpose. There must be a combination between them to effect such purpose."

¹²⁰ *Pellecat v. Angell*, 2 C. M. & R. 311.

mere knowledge, on the part of the seller of intoxicating liquors in another state, that the purchase was made with an intention to violate the laws of Iowa, would be sufficient to defeat an action on the contract, yet it is ruled that such knowledge is a fact from which, with other circumstances, the jury may infer an intent of the seller to participate in the illegal design.¹²¹ In Massachusetts, there was formerly a statute providing that "no action of any kind shall be had or maintained in any court for the price of any liquor sold in any other state for the purpose of being brought into this commonwealth, to be here kept or sold in violation of law, under such circumstances that the vendor would have reasonable cause to believe that the purchaser entertained such illegal purpose."¹²² After the repeal of this statute, it was held that the vendor might maintain an action for the price, if the sale was lawful where made, although the liquor was bought for the purpose of illegal resale in Massachusetts, and the seller had reasonable cause to believe that such was the intention. The ground of this ruling was that, at common law, mere reasonable cause of belief, without actual knowledge, on the part of the seller of goods, that the purchaser buys for the purpose of carrying them into another state and there reselling them in violation of its laws, is not sufficient to invalidate the sale.¹²³

§ 270. Participation in Illegal Design Defeats Action.

It is well settled that if a vendor of liquors in a foreign state in any way assists or participates in a design on the part of the purchaser to smuggle them into a state where they are prohibited, or to dispose of them unlawfully in such state, his complicity in the illegal scheme will prevent him from recovering the price in an action.¹²⁴ The general rule, on which the foregoing proposition depends, is well illustrated in the English case of *Waymell v. Reed*.¹²⁵ It there

¹²¹ *Tegler v. Shipman*, 33 Iowa, 194; *Rindskoff v. Curran*, 34 Iowa, 325.

¹²² Gen. St. Mass. 1860, c. 86, § 61.

¹²³ *Adams v. Couilliard*, 102 Mass. 167; *Ely v. Webster*, Id. 304; *Hotchkiss v. Finan*, 105 Mass. 86.

¹²⁴ *Banchor v. Mansel*, 47 Me. 58; *Back-*

man v. Wright, 27 Vt. 187; *Gaylord v. Soragen*, 32 Vt. 110; *Foster v. Thurston*, 11 Cush. 322; *Webster v. Munger*, 8 Gray. 584; *Feineman v. Sachs*, 33 Kans. 621, 7 Pac. Rep. 222; *Davis v. Bronson*, 6 Iowa, 410.

¹²⁵ 5 Term, 599.

appeared that the defendant applied to the plaintiff, a foreigner residing at Lisle, for a quantity of lace, which he knew was to be smuggled into England, and for that purpose it was to be packed by the plaintiff in a peculiar manner, by the direction of the defendant, for the more easy conveyance of it without discovery. The defense to the suit was that it was a smuggling transaction, and it was held that as the plaintiff was concerned in giving assistance to the defendant to smuggle the goods, by packing them in a manner most suitable to that purpose, and with an intent to aid in it, he could not resort to the laws of England to assist him in carrying his contract into execution.¹²⁶ In an analogous case, in New Hampshire, a decision was rendered against a foreign vendor of liquor, who aided the purchaser in his unlawful scheme by sending twenty-gallon kegs in sugar-barrels and smaller kegs in boxes packed in sawdust.¹²⁷ And it is held that if the seller does in fact intentionally further the illegal plan of the buyer, by forwarding the goods in a concealed or disguised form, calculated to accomplish that object, he cannot recover, even though it was not agreed between the parties, prior to or at the time or on the occasion of the sale, that the seller would thus aid the purchaser.¹²⁸

§ 271. Contract Void Where Made Void Everywhere.

If a sale of liquor is void in the state where it is made, because contrary to the laws of that state, it is held as void everywhere; and the seller cannot maintain an action for the price in the state where the goods are delivered and where the purchaser resides.¹²⁹ For example, the laws of Iowa prohibit the manufacture for sale or selling of intoxicating liquors within the state for any purpose, except for pharmaceutical, medical, chemical, and sacramental purposes, and then only by persons holding permits from the proper authorities. A certain brewing company, without such permit, manufactured and sold in that state a quantity of beer for the purpose of being

¹²⁶ See, also, *Biggs v. Lawrence*, 3 Term, 454; *Clugas v. Penaluna*, 4 Term, 466.

¹²⁷ *Fisher v. Lord*, 63 N. H. 514, 3 Atl. Rep. 927.

¹²⁸ *Aiken v. Blaisdell*, 41 Vt. 655.

¹²⁹ *Dudley v. Buckfield*, 51 Me. 254.

transported into Nebraska. It was held that the sale was in violation of said laws, and the contract, being prohibited by the laws of the state where made, was void there, and its invalidity constituted a good defense in an action upon the contract in Nebraska.¹³⁰ But in such a case, the burden is upon the defendant to show that the sale was illegal in the state where it was made.¹³¹

§ 272. Statute Forbidding Recovery on Foreign Sales.

In some of the states, there have been enacted statutes designed to prevent a recovery of the price of liquors sold by a non-resident dealer, under circumstances where the common law would have sustained an action, as, where the seller, though cognizant of the buyer's intention to make an illegal use of the goods, did nothing to further or facilitate the execution of his design. Thus, in Connecticut, it is provided that no action shall be maintained in any court of that state for liquors sold in any other state with intent to enable any person to violate the domestic statutes. And it is held that this statute is constitutional, and that it will be enforced although the particular sale may have been valid in the state where made, and an action may be sustainable upon it in such state.¹³² By the terms of the statute in Maine, if a person purchases intoxicating liquors out of the state, with the intention of selling any part thereof within the state in violation of its laws, the seller cannot recover the price of the goods, although he had no knowledge of such intention on the buyer's part.¹³³ By a law formerly in force in Massachusetts, but now repealed, it was provided that if the purchaser intended to make an illegal disposition of the liquors, and the foreign vendor had reasonable cause to believe that such was the case, there could be no recovery.¹³⁴ It was

¹³⁰ *Tredway v. Riley*, (Nebr.) 49 N. W. Rep. 268.

¹³¹ *Portsmouth Brewing Co. v. Smith*, (Mass.) 28 N. E. Rep. 1130.

¹³² *Reynolds v. Geary*, 26 Conn. 179. This statute is not retrospective; it applies to no sale prior to its enactment. *Donahoe v. Coleman*, 46 Conn. 319. If there has been an actual payment for

the liquors, by a bill of sale of goods within the state, such bill of sale is not invalidated by the provisions of the act. *Carter v. Clark*, 28 Conn. 512.

¹³³ *Meservey v. Gray*, 55 Me. 540. See *Rev. St. Me. 1883*, c. 27, § 56. And see *Barnard v. Field*, 46 Me. 526; *Dearborn v. Hoit*, 41 Me. 120.

¹³⁴ *Lindsey v. Stone*, 123 Mass. 332;

held that in order to sustain a defense, on this ground, to an action on a promissory note given for the price of liquors sold in another state, it was not sufficient to prove simply that the plaintiff had reasonable cause to believe that the purchaser intended to sell the liquors in Massachusetts in violation of law, but it must also be proved that the purchaser actually entertained such an intention.¹³⁵ And evidence that the seller knew that the buyer was a liquor-dealer does not necessarily prove the seller's knowledge that the buyer intended to resell the liquors in violation of law.¹³⁶

§ 273. Laws Forbidding Soliciting of Orders.

In the absence of a statutory prohibition, the mere solicitation, by a dealer in liquors, of orders for such goods to be filled in the future, even though he may have had reasonable cause to believe, and did believe, that the liquors would be resold by the purchaser in violation of the laws of the latter's state, is not such a circumstance as will affect the validity of a subsequent sale of such liquors in a state where the sale is not prohibited.¹³⁷ But in New Hampshire (and perhaps in some other states) statutes have been enacted which make the mere soliciting or taking of such orders, or the going from place to place soliciting or taking such orders, with knowledge or reasonable cause to believe that the liquors will be transported into the state and sold in violation of law, without any other act in furtherance of the vendee's design, a criminal offense punishable by fine or imprisonment.¹³⁸ Under this law, a person who has solicited orders for the sale of liquors, with the knowledge or reasonable cause of belief mentioned in the act, cannot recover the price of the same by suit, although the contract of sale may have been lawful in the state where it was made.¹³⁹ Whether a particular sale was in fact made

Bligh v. James, 6 Allen, 570; Finch v. Mansfield, 97 Mass. 89; Charlton v. Donnell, 100 Mass. 229.

¹³⁵ Savage v. Mallory, 4 Allen, 492.

¹³⁶ Frank v. O'Neil, 125 Mass. 473.

¹³⁷ Hill v. Spear, 50 N. H. 253; Jones v. Surprise, 64 N. H. 243, 9 Atl. Rep. 384; *supra*, § 269.

¹³⁸ Gen. Laws N. H. c. 109, § 18.

¹³⁹ Jones v. Surprise, 64 N. H. 243, 9 Atl. Rep. 384; Dunbar v. Locke, 62 N. H. 442; Holden v. Brooks, (N. H.) 20 Atl. Rep. 247; Lang v. Lynch, 38 Fed. Rep. 489.

The decision in Dunbar v. Locke and Jones v. Surprise, *supra*, has been over-

in violation of the terms of such a statute, is a question of fact to be determined by the jury.¹⁴⁰ In Connecticut, there is a law which forbids all persons, without a license therefor, to sell intoxicating liquor "by sample, or by soliciting or procuring orders." And it is held that a contract for a sale, made in that state by a travelling agent of a firm in another state, of liquors to be delivered in such other state, is in violation of the statute.¹⁴¹

§ 274. Contracts against Policy of Liquor Laws.

There are various species of contracts and transactions between parties which, though not expressly prohibited by statute, are considered void because contrary to the policy and purpose of the liquor laws, or by reason of their being so closely connected with illicit dealings in liquor as to be infected with the illegality. For example, an attempted assignment of a liquor license is void. And hence a contract by which, in consideration of a gross sum, the plaintiff leased the bar of his hotel to defendant, conveyed to defendant the right to sell liquor under a license obtained by plaintiff, and agreed to board defendant during the lease, was held to be totally void, the legal part of the agreement being inseparable from the illegal.¹⁴² So where the plaintiff, with others, was interested in a quantity of spirituous liquor, which was placed, by a mutual arrangement between the parties, in the hands of the defendant to sell, and he sold the same, in violation of the license law, and the plaintiff derived his title to his proportion

ruled in the recent case of *Durkee v. Moses*, (N. H.) 23 Atl. Rep. 793, on the ground that the statute in question was an unconstitutional restriction of interstate commerce, as shown by *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681. And it is held that the price of liquors so sold by a foreign vendor may be recovered, notwithstanding the statute, where the sale was made *before the passage of the Wilson Act* (*supra*, § 76.) But since that act is generally understood to put the power of the states exactly where it was supposed

to stand before the decision in *Leisy v. Hardin*, it would seem that the New Hampshire statute should now be regarded as in full force and virtue, and that a recovery should be denied on all sales made, in the forbidden manner, since August 8, 1890.

¹⁴⁰ *Dunbar v. Locke*, 62 N. H. 442.

¹⁴¹ *State v. Ascher*, 54 Conn. 299, 7 Atl. Rep. 822.

¹⁴² *Sanderson v. Goodrich*, 46 Barb. 616; *supra*, § 130. See, also, *Ritchie v. Smith*, 6 C. B. 462.

of the money received by defendant upon such sale, through such arrangement or contract, and it also being necessary for the plaintiff, in order to sustain his action, to prove the arrangement under which the liquor went into the hands of the defendant and the illegal sale itself, it was held that the contract was so connected with the illegal sale of the liquor that the plaintiff could not recover any portion of the money received upon such sale.¹⁴³ On a similar principle, a plaintiff cannot recover for his personal services, portions of which were rendered in an employment of selling liquors unlawfully, the contract of service being an entirety; but he is not to be prevented from recovering for his services contracted to be rendered in a lawful employment, merely because, during the time of his employment, he occasionally assists his employer in such unlawful business gratuitously, not expecting or seeking any compensation therefor.¹⁴⁴ In accordance with the same general principle, it is held that no action lies upon a warranty given upon the sale of a horse, the price of which was paid in spirituous liquors which the purchaser could not legally sell.¹⁴⁵ And so, where an assignment of rent is made in consideration of intoxicating liquors, the assignee cannot maintain an action for its recovery.¹⁴⁶ But on the other hand, as the public policy of the state is to restrain the traffic in intoxicating liquors, it follows that a contract in restraint of that traffic, if made upon a sufficient consideration, will be enforced by the courts, though the restraint be territorially co-extensive with the state.¹⁴⁷

§ 275. Avoidance of Leases.

In several of the states, the statutes are so framed as to permit a landlord, whose tenant is using the demised premises for the unlawful sale of intoxicating liquors, to cancel the lease and recover possession of the property. Under these acts, an action of forcible entry and detainer may be maintained, for the restoration of the landlord to possession, without any previous judicial proceeding to ascertain and declare the forfeiture of the lease.¹⁴⁸ And the tenant cannot

¹⁴³ Buck v. Albee, 27 Vt. 184.

¹⁴⁴ Goodwin v. Clark, 65 Me. 280;

Timson v. Moulton, 3 Cush. 269.

¹⁴⁵ Howard v. Harris, 8 Allen, 297.

¹⁴⁶ Davis v. Slater, 17 Iowa, 250.

¹⁴⁷ Harrison v. Lockhart, 25 Ind. 112.

¹⁴⁸ McGarvey v. Puckett, 27 Ohio St. 669.

defeat the proceedings by showing that he has paid rent in advance for the entire term.¹⁴⁹ The landlord may also dispossess his lessee from the whole premises, notwithstanding the wrong-doer is not his immediate lessee, but is a sub-tenant, and of a part only of the building.¹⁵⁰ In Ohio, under one section of the statute, the use of the premises by the tenant for the unlawful sale of liquor renders the lease void at the election of the lessor; but where the lease was made for the purpose of having the premises so used, and this purpose is afterwards accomplished by the tenant, then, under another section, the lease becomes void as to both parties.¹⁵¹ And in New Hampshire, under a law imposing a penalty on any person owning or controlling any premises who shall suffer them to be used for the sale of spirituous liquors, it is held that a person who owns a building and has knowledge that his tenant at will is using the premises for the sale of liquor, and raises his rent in consequence, but not for the purpose of ousting him, cannot recover for their use and occupation.¹⁵²

§ 276. Who may Take Advantage of Illegality.

A contract in violation of a statute, when introduced as evidence of a right to recover thereon, may be effectually resisted by a party to it, or by one in legal privity, but not by a mere stranger. Hence, where a mortgage is made to secure a claim for liquor sold in violation of law, and a subsequent mortgage of the same property is made to another person to secure a lawful debt, the receiving of the money by the first mortgagee, for his claim, by a sale or discharge of the mortgage, will not subject him to an action by the second mortgagee to recover such money.¹⁵³ Nor does a prohibitory liquor law go far enough to avoid all dealings not immediately between buyer and seller, or prevent such dealings from being included within grounds of estoppel and agency; and one who has authorized another to pay money on his behalf cannot recall the agency, or repudiate the payment, after the agent has performed his instructions.¹⁵⁴

¹⁴⁹ *McGarvey v. Puckett*, 27 Ohio St.

669.

¹⁵⁰ *People v. Bennett*, 14 Hun, 63.

¹⁵¹ *Justice v. Lowe*, 26 Ohio St. 372.

¹⁵² *Mitchell v. Scott*, 62 N. H. 596.

¹⁵³ *Ellsworth v. Mitchell*, 31 Me. 247.

¹⁵⁴ *McGunn v. Hanlin*, 29 Mich. 476.

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PART I. CIVIL DAMAGE STATUTES.**§ 277. Terms of the Statutes.**

The statutes which are now familiarly known as "civil damage laws" are intended to impose a civil responsibility upon liquor dealers for some of the evils which their traffic engenders. These laws give a right of action, against such persons, to innocent parties who

sustain injury by the intoxication of persons supplied with liquor by the defendants, or the consequences of such intoxication, or by the acts of intoxicated persons, or by the furnishing of liquor to minors or drunkards after warning given not to do so. The terms of the civil damage laws, in the various states where they have been enacted, are not uniform, but they are all addressed to one or other of the objects just mentioned. The following synopsis will exhibit the language and scope of these statutes with sufficient detail for the present purpose.

Illinois. "Every husband, wife, child, parent, guardian, employer, or other person, who shall be injured in person, property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication in whole or in part of such person or persons. And any person owning, renting, leasing, or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who, having leased the same for any other purpose, shall knowingly permit the sale therein of any intoxicating liquors that have caused in whole or in part the intoxication of any person, shall be liable, severally or jointly with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages."¹

Statutes substantially the same as the foregoing are in force in Arkansas,² Colorado,³ Iowa,⁴ Kansas,⁵ Maine,⁶ Michigan,⁷ New Mex-

¹ Rev. St. Ill. 1889, c. 43, § 9.

² Laws Ark. 1873, p. 386, § 4. But this statute is confined to the county of Washington.

³ Mill's Ann. St. Colo. 1891, § 1513. But it is here confined to cases of sales to habitual drunkards, and notice not to sell to such persons must first have been given to the dealer.

⁴ McClain's Ann. Code Iowa 1888, §§ 2418, 2419.

⁵ Comp. Laws Kans. 1885, § 2301. The

owner or lessor is liable for fines and costs assessed under the general liquor law, (§ 2304,) but apparently not for damages in a civil damage suit.

⁶ Rev. St. Me. 1883, c. 27, § 49. But here the cause of action may be for injury to "person, property, means of support, or otherwise."

⁷ 3 How. Ann. St. Mich. § 2283, cl. 20. (As in Maine; but no liability is imposed on the lessor.)

ico,⁸ New York,⁹ Ohio,¹⁰ Washington,¹¹ West Virginia,¹² and Wisconsin.¹³

In *Connecticut*, the law provides that "every person who by himself or his agent shall sell any spirituous and intoxicating liquor to any other person to be drunk on the premises, who thereby becomes intoxicated, and who, while so intoxicated, shall in consequence of such intoxication injure the person or property of another, shall pay just damages to the person injured, to be recovered in an action on this statute."¹⁴

In *Dakota*, the law provides for the giving of notice not to sell, at the instance of any relative of a person addicted to excessive drinking, and the seller who violates the notice forfeits his license, is subject to a fine, and is "liable in a civil action at the suit of such relative to pay him, her, or them, the sum of five hundred dollars damages for each offense."¹⁵

Indiana. "Every person who shall sell, barter, or give away any intoxicating liquors in violation of any of the provisions of this act, shall be personally liable . . . to any person who shall sustain any injury or damage to their persons or property or means of support on account of the use of such intoxicating liquors, so sold as aforesaid, to be enforced by appropriate action in any court of competent jurisdiction."¹⁶

In *Kentucky*, a licensed liquor-seller is liable to a fine of \$20 for furnishing liquor to a known inebriate. And "for every violation of this section, the wife or any relative of the inebriate may recover not less than a like amount for her or his benefit, before any court of competent jurisdiction. Notice in writing that the person is an inebriate, and forbidding the sale or giving of such liquors to him, shall be given to the person so licensed, by the wife or relative of such

⁸ Laws New Mex. 1887, p. 45. The same as in Colorado.

⁹ 2 Rev. St. N. Y. p. 1309, § 15; Laws N. Y. 1873, c. 646.

¹⁰ Rev. St. Ohio 1890, § 4357. But notice not to sell must have been given.

¹¹ Code Wash. 1881, § 2059.

¹² Code W. Va. 1891, c. 32, § 20, p. 236.

¹³ Rev. St. Wis. § 1560. But here it is confined to sales to minors and habitual drunkards, and notice not to sell must first have been given.

¹⁴ Gen. St. Conn. 1888, § 3101.

¹⁵ Polit. Code Dak. 1885, c. 35, § 4.

¹⁶ Acts Ind., Special Sess. 1875, p. 59, § 20.

inebriate, before the action provided for in this section can be maintained.”¹⁷

Massachusetts. “The mayor of a city or any one of the selectmen of a town in which a person lives who has or may hereafter have the habit of drinking spirituous or intoxicating liquor to excess, may give notice in writing, signed by him, to any person, requesting him not to sell or deliver such liquor to the person having such habit. If the person so notified, at any time within twelve months thereafter, sells or delivers any such liquor to the person having such habit, or permits such person to loiter on his premises, the person giving the notice may, in his own name, in an action of tort, brought at his election for the benefit either of the husband, wife, child, parent, or guardian of the person having such habit, recover of the person so notified such sum, not less than one hundred nor more than five hundred dollars, as may be assessed as damages.”¹⁸

In *Minnesota*, after the revocation or forfeiture of a license, “the person who has so violated the conditions of the said bond shall . . . be liable for all damages done by persons intoxicated by liquors obtained from him; and the sureties on said bond shall be jointly and severally liable with the principal for the payment of said damages, to be recovered in a civil action.”¹⁹

Nebraska. Here the statute provides that “the person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic; he shall support all paupers, widows, and orphans, and the expenses of all civil and criminal prosecutions, growing out of, or justly attributed to, his traffic in intoxicating drinks. It shall be lawful for any married woman, or any other person at her request, to institute and maintain, in her own name, a suit on any such bond for all damages sustained by herself and children on account of such traffic, and the money when collected shall be paid over for the use of herself and children.”²⁰

In *New Hampshire*, the law provides for the giving of notice by any near relative, or the guardian or employer, of an habitual drunkard,

¹⁷ Gen. St. Ky. 1888, p. 1235.

¹⁸ St. Mass. 1885, c. 282.

¹⁹ Gen. St. Minn. 1887, c. 16, § 3.

²⁰ Comp. St. Nebr. 1891, p. 555, §§ 15, 16.

to liquor-sellers not to sell to him, and that, upon disregard of the notice, the person who gave the same may recover from the person notified, in an action of tort, from \$50 to \$500 as damages.²¹

North Carolina. "The father, or if he be dead, the mother, guardian, or employer of any minor, to whom a sale or gift shall be made in violation of the preceding section, shall have a right of action in a civil suit against the person or persons so offending by such sale or gift, and upon proof of such illicit sale or gift, shall recover from such party or parties so offending such exemplary damages as a jury may assess; provided that such assessment shall not be less than twenty-five dollars."²²

Pennsylvania. "Any person furnishing intoxicating drinks to any other person, in violation of any existing law, or of the provisions of this act, shall be held civilly responsible for any injury to person or property in consequence of such furnishing; and any one aggrieved may recover full damages against such person so furnishing, by action on the case." And another section provides for giving notice not to sell to an habitual drunkard, and for the recovery, in an action of tort, of from \$50 to \$500 as damages for violation of such notice.²³

Rhode Island. "If any person in a state of intoxication commits any injury to the person or property of another, the person who furnished him with any part of the liquor which occasioned his intoxication, if the same was furnished in violation of this act, shall be liable to the same action by the party injured as the person intoxicated would be liable to; and the party injured, or his legal representative, may bring either a joint action against the person intoxicated and the person who furnished the liquor, or a separate action against either."²⁴

In *South Carolina*, the statute provides for giving notice not to sell to a minor, drunkard, or lunatic; and if the prohibition of the notice is violated, the seller shall be "responsible for any injury to person or property which may occur in consequence of such furnishing, and any one aggrieved may recover damages against the person so

²¹ Gen. Laws N. H. 1878, c. 109, § 28.

²² Code N. Car. 1883, § 1078.

²³ Bright. Purd. Dig. Pa. p. 1082, § 47.

²⁴ Laws R. I., May Sess. 1886, c. 596, § 48.

furnishing. . . . And in case any wife shall give such notice, she shall be entitled to recover of the person furnishing intoxicating liquor to her husband, in an action in her own name, such damages as any court or jury may award, for the maintenance of herself and family during the period when her husband, by reason of such furnishing, is incapable of providing for the proper support of her or them."²⁵

Utah. "It shall be lawful for any married woman to institute and maintain, in her own name, a suit on any such bond, for all damages sustained by herself and children, or either, on account of such traffic, and the money when collected shall be paid over for the use of herself and children, or either."²⁶

Vermont. "Whenever any person is confined in jail, the house of correction, or the state prison, by reason of intoxication, or by reason of any criminal act done or committed while intoxicated, the wife of such person in her own name, and in case such person has no wife, his minor child or children, may, in an action founded on this statute, recover of the person who by himself, clerk, servant, or agent, illegally sold, furnished, or gave away to such person, any part of the intoxicating liquor upon which such person became intoxicated, the sum of two dollars per day for all the time such person may be thus confined, to be recovered at the end of such confinement, or at the end of each and any month of such confinement, with double costs." And the lessor of the seller may be joined as a defendant, if cognizant of the illegal sale of liquor on the premises."²⁷

§ 278. Constitutionality of Statutes.

The validity of the civil damage laws, on constitutional grounds, has often been called in question, but never with success. They are held to be proper and legitimate exertions of the legislative power, and their constitutionality is now well established.²⁸ Although a per-

²⁵ Gen. St. S. Car. § 1738.

²⁶ Laws Utah 1882, p. 32, § 7.

²⁷ Laws Vt. 1886, No. 36, p. 30.

²⁸ *Bedore v. Newton*, 54 N. H. 117; *Stanton v. Simpson*, 48 Vt. 628; *Moran*

v. Goodwin, 130 Mass. 158, 39 Am. Rep. 443; *Baker v. Pope*, 2 Hun, 556; *Franklin v. Schermerhorn*, 8 Hun, 112; *Sibila v. Bahney*, 34 Ohio St. 399; *Horning v. Wendell*, 57 Ind. 171; *Werner v. Ed-*

son sought to be made liable under such a statute was duly licensed to sell liquor at the time the law went into effect, yet it is not an unconstitutional invasion of his rights. For a license, as already explained, is not a contract, the obligation of which is protected from impairment, and when the holder acquired the privilege which it conferred, he took it subject to any additional burdens or responsibilities which the law might impose.²⁹ And if the statute requires a bond, as a condition precedent to a license to sell, conditioned that the dealer will not sell to any husband after notification from the wife, this does not abridge the privileges or immunities of citizens guarantied by the federal constitution.³⁰ Nor is the law unconstitutional,—as holding one man responsible for the act of another,—when it makes the seller liable for an injury to which his unlawful sale or furnishing contributed “in part” only. It simply puts him in the position of a joint tort-feasor, who, on common law principles, is liable for the entire damages.³¹ Further, if the statute authorizes a recovery against the owner or lessor of the premises on which the sale is made, he knowing and consenting to the carrying on of the traffic on such premises, it cannot be considered an unlawful “taking” or “depriving” of his property, within the meaning of the constitution.³²

§ 279. Construction of Statutes.

The civil damage law, being highly penal in its character, and introducing remedies unknown to the common law, and, as the statutes are framed in some jurisdictions, giving to the party prosecuting a decided advantage over the party defending, should receive a strict construction.³³ Hence, for example, no person can maintain an action under its provisions to whom a right of action is not given by its terms.³⁴ But on the other hand, “while a statute of this char-

miston, 24 Kans. 147; Kreiter v. Nichols, 28 Mich. 496; State v. Ludington, 33 Wis. 107; *supra*, § 56.

²⁹ Moran v. Goodwin, 130 Mass. 158, 39 Am. Rep. 443; Baker v. Pope, 2 Hun, 556; Horning v. Wendell, 57 Ind. 171.

³⁰ Bell v. State, 28 Tex. App. 96, 12 S. W. Rep. 410.

³¹ Sibila v. Bahney, 34 Ohio St. 399.

³² Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323.

³³ Meidel v. Anthis, 71 Ill. 241; Freese v. Tripp, 70 Ill. 496; Fentz v. Meadows, 72 Ill. 540.

³⁴ Schneider v. Hosier, 21 Ohio St. 98.

acter should not be enlarged, it should be interpreted, where the language is clear and explicit, according to its true intent and meaning, having in view the evil to be remedied and the object to be obtained. The evident object was to suppress the sale and use of intoxicating liquors, and to punish those who, in any form, furnished means of intoxication, by making them liable for damages which might arise, which were caused by the parties who furnished such means." ³⁵ And indeed it would be a gross failure of justice to put so narrow a construction upon these acts as to impair the effects they were intended to produce. Their beneficent purpose is not to be defeated by technical or verbal niceties.

§ 280. Statutes not Extra-Territorial.

A civil damage law is enacted for the benefit of the citizens of the particular state, and intends that the cause of action shall arise within the state. It has no extra-territorial operation or effect. Hence, for example, where a person residing in Vermont went into the state of New York, and there bought liquor from A. and became intoxicated, and in that condition returned to his home and did damage to the property of B., it was held that B. could not maintain an action against A., under the civil damage law of New York, in the courts of that state.³⁶

§ 281. Nature and Form of Action.

The action given under the civil damage laws is entirely statutory, and hence must be governed wholly by the provisions of the statute. At the common law, it was not an actionable wrong to either sell or give intoxicating liquors to a strong and able-bodied man.³⁷ The effect of the statutes in question is to create a new cause of action in tort. A suit brought under them is purely and entirely an action *ex delicto*; and not only that, but it is for a personal tort and injury,

³⁵ Mead v. Stratton, 87 N. Y. 493, 41 Am. Rep. 386.

³⁶ Goodwin v. Young, 34 Hun, 252.

³⁷ Cruse v. Aden, 127 Ill. 231, 20 N. E. Rep. 73. And at common law, a seller

cannot be liable for improper use made of liquors, unless he knows of the intended improper use. Struble v. Nodwift, 11 Ind. 64.

as much so as in the case of an assault and battery. It follows, therefore, that the cause of action is not assignable.³⁸ Where the common law system of pleading is in force, it appears that *case* is the proper form of action under the civil damage laws. And a demand so pleaded cannot properly be joined with a count in *assumpsit* for the recovery, under the statute, of money paid for liquors.³⁹ If the civil damage law is repealed, it is held that the repeal destroys all rights of action previously acquired or vested under it, even in the case of pending suits, unless the repealing act contains an express saving clause.⁴⁰

§ 282. Limitation of Action.

The ground of an action for personal injuries is the tortious act against the person injured, although the right of action therefor is conferred by statute in certain cases upon the husband or wife or personal representatives. Hence, in a case arising under the civil damage law, the statute of limitations begins to run from the date of selling or furnishing the liquors which caused the intoxication, and not from the day when that intoxication occasioned damage or loss or injury to the plaintiff.⁴¹ In Massachusetts, it is held that such an action is an action to recover a penalty or forfeiture, within the meaning of a statute prescribing a limitation for such suits, and if not brought within one year after the sales take place, it is barred by said statute.⁴²

PART II. WHAT PERSONS ARE ENTITLED TO SUE.

§ 283. Wife or Widow.

The great majority of actions under the civil damage laws are brought by injured and impoverished wives, in so much that the statutes might seem to have been enacted for their especial benefit.

³⁸ McGee v. McCann, 69 Me. 79.

⁴⁰ Curran v. Owens, 15 W. Va. 208.

³⁹ Friend v. Dunks, 37 Mich. 25; Schaffer v. Boyce, 41 Mich. 256, 2 N. W. Rep. 1.

⁴¹ Emmert v. Grill, 39 Iowa, 690.

⁴² O'Connell v. O'Leary, 145 Mass. 311, 14 N. E. Rep. 143.

The fact that such laws specifically mention the "wife" of an intoxicated person as one to whom the right of action is given, has occasioned some question as to her right to maintain an action when the injury complained of is the death of the husband. It is argued that the statute is to be strictly construed, and no one has a right of action to whom it is not expressly given; that when the husband dies the plaintiff is no longer a "wife;" and that, as the act does not mention the "widow," she cannot sue. But the courts have unanimously repudiated this contention. The term used is descriptive of a class, and it is sufficient if she sustained the relation of wife at the time of the intoxication which caused the husband's death. The relation of wife, although essential, by the language of the statute, to the inception of the right of action, is not necessary in the prosecution of the remedy. The right of action vests in her at the time the defendant causes the intoxication of the person who subsequently dies, and having vested, the statute does not divest it upon the death of the husband, nor does it abate upon common law principles. By the death the plaintiff loses her character of wife, but her identity is not changed.⁴³

§ 284. Husband.

A husband may maintain an action, under the civil damage law, for injury to his means of support, by the intoxication of his wife, caused by liquor sold her by the defendant; as when, in consequence of such intoxication, she is rendered incapable of doing her customary work in the keeping of plaintiff's house and the care of his children, and he thereby loses her services in those respects. The wife is under no legal obligation to support the husband, but she may be, in fact, wholly or in part a means of support to him.⁴⁴ But in Nebraska, where the statute provides that "the amount recovered shall be for the exclusive benefit of the widow and next of kin," it is held that the husband cannot recover for himself, in case of the death

⁴³*Schneider v. Hosier*, 21 Ohio St. 98; 715, 31 Am. Rep. 409; *Jackson v. Brookins*, 5 Hun, 530.
Hackett v. Smelsley, 77 Ill. 109; *Roose v. Perkins*, 9 Nebr. 304, 2 N. W. Rep.

⁴⁴*Moran v. Goodwin*, 130 Mass. 153, 39 Am. Rep. 443.

of the wife, because, under the law of that state, he does not inherit from the wife, and therefore cannot be considered as within the designation "next of kin;" nor can he maintain an action as executor, unless it appears that there are next of kin who are entitled to the amount to be recovered, and the petition should state the existence of such persons.⁴⁵

§ 285. Father.

Where liquor is sold to a minor, whereby he becomes intoxicated, and he thereafter becomes sick in consequence thereof, and the father is deprived of his services, and is compelled to expend money for medical attendance upon him, the father may maintain an action, under the civil damage law, to recover the damages occasioned thereby.⁴⁶ But if the son is a major, and there is neither a subsisting family relation nor the relation of master and servant between his father and himself, the father is not within the terms of a statute which renders the seller of liquor to one already intoxicated civilly liable to "any one aggrieved" in person or property in consequence thereof; and if the father voluntarily expends money for medical services, etc., for the benefit of the son, he cannot recover against the liquor-seller.⁴⁷ But on the other hand, if the father has voluntarily assumed the support of an indigent adult son, who is a "poor person" within a statute requiring a father, if of sufficient ability, to support such a son, he can recover against one who, by furnishing liquor to the son, rendered him helpless and a burden on his father, though the officers having charge of the poor have never taken the son into their custody.⁴⁸

§ 286. Dependent Mother.

A widow who is dependent on her son for her support may maintain an action in her own name, under the civil damage law, against a liquor-seller who, by his sales to the son, has deprived her of her

⁴⁵ Warren v. Englehart, 13 Nebr. 283, 13 N. W. Rep. 401.

⁴⁶ Volans v. Owen, 9 Hun, 558. See Stevens v. Cheney, 36 Hun, 1.

⁴⁷ Veon v. Creaton, 138 Pa. St. 48, 20 Atl. Rep. 865.

⁴⁸ Clinton v. Laning, 61 Mich. 355, 28 N. W. Rep. 125.

means of support or injured her therein.⁴⁹ And in Massachusetts, it is held that the action given by the statute to the "parent" of a minor to whom liquor has been sold, may be maintained by his mother without proof that he has no father.⁵⁰

§ 287. Son or Daughter.

Under the civil damage laws, as they are usually framed, the right of a child to maintain an action for damages caused by the furnishing of liquor to his parent depends upon his sustaining some personal or pecuniary injury, or being deprived of the means of support. But under the statute in Massachusetts, it is held that the right of action given to the child of a person in the habit of drinking liquor to excess, against the person selling liquor to the parent, does not depend upon the minority of the child, or his inability to support himself by his own exertions. "The statute contemplates that the habitual drunkenness of a husband or wife, parent or child, is a substantial injury to those bound together in domestic relations, and gives such a right to recover damages in the nature of a penalty, not only for any injury to the person or property, but for the shame and disgrace brought upon them."⁵¹

§ 288. Employer.

Where the civil damage act gives a right of action to any "employer" injured by acts falling within its terms, it is held that railroad contractors may maintain a suit against a person who sells intoxicating liquor to their hired hands, whereby such employes become intoxicated, so that they not only do not work themselves, but also prevent others of the hired hands from working. In such a case, the plaintiffs are injured in respect to their property and their means of support.⁵²

⁴⁹ McClay v. Worrall, 18 Nebr. 44, 24 N. W. Rep. 429.

⁵⁰ McNeil v. Collinson, 130 Mass. 167.

⁵¹ Taylor v. Carroll, 145 Mass. 95, 13 N. E. Rep. 348.

⁵² Duroy v. Blinn, 11 Ohio St. 331. See Northern Pac. R. Co. v. Whalen, 3 Wash. Ter. 452, 17 Pac. Rep. 890.

§ 289. Stranger Injured by Intoxicated Person.

If the statute, as is commonly the case, gives a right of action to any "husband, wife, . . . or other person who shall be injured," etc., it is not necessary that the plaintiff should stand in any business or personal relation to the intoxicated person who did the damage. It is enough if he has been injured, in his person, property, or means of support, by a drunken man, whose intoxication was caused by the defendant. Thus, an action may be maintained by a person prevented from following his usual occupation by being beaten and wounded by an intoxicated person, against the seller of the liquor by which the intoxication was produced, and it is not necessary to make such intoxicated person a party defendant.⁵³ So an action was sustained in a case where the intoxicated person, driving his buggy recklessly along the public street, ran into the plaintiff's vehicle and killed the plaintiff's horse.⁵⁴ So, where defendant sold liquor to plaintiff's son-in-law, who, becoming intoxicated thereby, drove a team, behind which plaintiff's wife was riding, so recklessly as to upset the wagon and break the wife's arm, it was held that the plaintiff was entitled to recover for the loss of her services and the expenses of medical attendance upon her.⁵⁵

§ 290. Town or Poor District.

The civil damage law, it is held, does not extend so far as to enable a town upon which a person not previously drawing support becomes dependent, under the poor laws, through injuries sustained in consequence of intoxication, to recover for support furnished to him, against the seller of the liquor. Thus, where one bought liquor and became intoxicated, and by reason of exposure in his helpless condition his feet were frozen, and he came upon the town for support, and the town sued the liquor-seller for reimbursement, it was held that the plaintiff could not recover.⁵⁶

⁵³ *English v. Beard*, 51 Ind. 489; *Bodge v. Hughes*, 53 N. H. 614.

⁵⁴ *Flower v. Witkovsky*, 69 Mich. 371, 37 N. W. Rep. 364.

⁵⁵ *Aldrich v. Sager*, 9 Hun. 537.

⁵⁶ *Hollis v. Davis*, 56 N. H. 74.

§ 291. Intoxicated Person as Plaintiff.

Under the civil damage law in Nebraska, which declares that a person licensed to sell liquor "shall pay all damages that the community or individuals may sustain in consequence of such traffic," it has been held that the intoxicated person himself may in some cases have a right of action against the seller. Thus, where a person voluntarily went to a licensed liquor-saloon, and bought and drank liquor, and became intoxicated, and lay down in the road in a stupefied and unconscious condition, and thereby his legs were frozen so that they had to be amputated, it was adjudged that he might recover damages against the person who sold him the liquor.⁵⁷ This decision, however, cannot be regarded as good law. It seems very clear that the case was one calling for the application of the maxim, *volenti non fit injuria*. And as for the words in the statute, italicized above, it must be perfectly apparent that they were intended to apply only to innocent third persons who might be injured by the fact or the consequences of the intoxication. In Michigan, where the law gives to "every wife . . . or other person" a right of action against a liquor-seller for injury done the plaintiff by reason of the intoxication of any person, it is held that this does not entitle the intoxicated person himself to maintain an action against the dealer for money stolen from him while drunk.⁵⁸

§ 292. Seller Cannot Recover.

However broad the terms of the statute may be, they will not authorize the vendor of liquor to maintain an action for damage which he sustains by the acts or behavior of a drunken man whose intoxication he himself brought about by furnishing him with liquor. By his acts he participates in the wrong. Whatever injury the intoxicated person may do to the person or property of the liquor-seller, the civil damage laws give the latter no redress. For the injury is

⁵⁷ Buckmaster v. McElroy, 20 Nebr. 557, 31 N. W. Rep. 76.

⁵⁸ Brooks v. Cook, 44 Mich. 617, 7 N. W. Rep. 216, 38 Am. Rep. 282.

regarded as the consequence of a state of affairs which he either intended or at least consented and contributed to.⁵⁹

§ 293. Joinder of Plaintiffs.

Where the consequences of the intoxication of a person are productive of injury to more than one person,—as, to his wife and also to his children,—it becomes a question whether such persons are properly joined as plaintiffs in an action under the civil damage law, or should bring separate suits. In Nebraska, it is held that a married woman and her minor children, constituting one family, may join in an action for loss of the means of support against one who furnished liquor to the husband and father.⁶⁰ And the same result is deducible from the language of the statutes in some other states. But elsewhere it is held that the wife and minor children may each maintain a separate action for damages, and hence they cannot properly join as plaintiffs, nor can the wife, suing as sole plaintiff, recover any allowance in respect to her minor children.⁶¹ In a case in New York, where the cause of action was for the loss of certain money stolen from the intoxicated person, and his family consisted of a wife and four children, it was held that the wife, as plaintiff, could recover only her proportionate share of the amount, or one-fifth thereof. The court observed that although the law probably intended to give a single right of action and single damages to one person, yet it was so vaguely expressed that it did in effect give a right of action to the husband or wife and also to each of the children.⁶² As these statutes give a right of action to a wife in her own name, it is not necessary that the husband, whose intoxication

⁵⁹ Aldrich v. Harvey, 50 Vt. 162.

⁶⁰ *Roose v. Perkins*, 9 Nebr. 304, 2 N. W. Rep. 715, 31 Am. Rep. 409; *Kerkow v. Bauer*, 15 Nebr. 150, 18 N. W. Rep. 27; *Wardell v. McConnell*, 23 Nebr. 152, 36 N. W. Rep. 278; *Jones v. Bates*, 26 Nebr. 693, 42 N. W. Rep. 751.

⁶¹ *Rosecrants v. Shoemaker*, 60 Mich. 4, 26 N. W. Rep. 794; *Larzelere v. Kirchgessner*, 73 Mich. 276, 41 N. W. Rep. 488; *Johnson v. Schultz*, 74 Mich. 75, 41

N. W. Rep. 865; *Thomas v. Dansby*, 74 Mich. 398, 41 N. W. Rep. 1088; *Delfel v. Hauson*, (Wash.) 26 Pac. Rep. 220; *Secor v. Taylor*, 41 Hun, 123; *Durein v. Pontious*, 34 Kans. 353, 8 Pac. Rep. 428; *McGee v. McCann*, 69 Me. 79; *Huggins v. Kavanagh*, 52 Iowa, 368, 3 N. W. Rep. 409; *Welch v. Jugenheimer*, 56 Iowa, 11, 8 N. W. Rep. 673.

⁶² *Franklin v. Schermerhorn*, 8 Hun, 112.

caused the injury of which she complains, should be joined as a co-plaintiff.⁶³

PART III. WHAT PERSONS ARE LIABLE.

§ 294. Immediate and Remote Vendor.

As a rule, the liability under the civil damage laws is confined to the person who directly caused the intoxication complained of, by furnishing liquor to the inebriate. If the same liquor has passed through several hands, this does not establish a joint or successive liability on the part of all those who have sold it. Thus, if A. sells liquor to B., and B. sells it to C., and C. thereby becomes intoxicated and injures D., the latter has a right of action against B. but not against A.⁶⁴ But it is said that if the seller knew or had good reason to believe, when he sold the liquor, that the purchaser intended to share it with another person, and such other person does afterwards become intoxicated by it and is the cause of damage, then the seller will be liable to the person who is injured.⁶⁵ If two separate liquor-sellers furnish liquor at different times to the same person, producing two separate fits of intoxication, with an interval of sobriety between, and injury results from the second fit of intoxication, the first seller is not liable therefor.⁶⁶ Where a partnership engaged in selling liquors is dissolved, one of the partners retiring, and subsequently the other partner in good faith sells out the entire business to a stranger, and the license issued to the firm is surrendered, the retiring partner cannot be held liable, under the license and bond, for loss of support to a wife caused by the death of her husband, resulting from the sale of liquor to him by the stranger who succeeded to the business of the firm.⁶⁷

⁶³ Mitchell v. Ratts, 57 Ind. 259.

⁶⁴ Bush v. Murray, 66 Me. 472.

⁶⁵ Dudley v. Parker, 55 Hun, 29, 8 N.

Y. Supp. 600. See Gullikson v. Gjourd,

82 Mich. 503, 46 N. W. Rep. 723.

⁶⁶ Barks v. Woodruff, 12 Ill. App. 96.

⁶⁷ Scott v. Choze, (Nebr.) 49 N. W. Rep. 940.

§ 295. Person not a Liquor Seller.

The terms of the civil damage laws, as they stand in most of the states, are broad enough to include all persons who furnish liquor to others and thereby cause intoxication and consequent injury. And in proper cases a liability might well be fastened upon persons who are not personally engaged in the business of selling liquor. But considerations drawn from the purpose and policy of such statutes, as well as from the forms of expression employed, show that they are not intended primarily to apply to persons who are not, either directly or indirectly, or in any way or to any extent, engaged in the liquor traffic. Hence, for example, the civil damage law does not give a right of action against one who gives, in his own home or elsewhere, a glass of liquor to a friend as a mere act of courtesy or hospitality, without any purpose or expectation of pecuniary gain or profit.⁶⁸

§ 296. Personal and Bonded Liability.

The bonds required to be furnished by licensed dealers in liquor are in some states, as we have already seen,⁶⁹ conditioned for the payment of judgments recovered against them under the civil damage laws, as well as of fines and costs assessed for violations of the general liquor law. It is held, however, that the fact that the saloon-keeper furnishing the liquor is made liable on his bond does not prevent the wife and minor children of the person to whom it was furnished from suing him personally; the effect of the law is to give a double remedy or a choice of remedies.⁷⁰

§ 297. Sureties on Dealer's Bond.

The sureties on a liquor-dealer's bond, conditioned for the payment of any judgment recovered under the civil damage laws, are of course responsible only after a recovery against the principal has

⁶⁸ *Cruse v. Aden*, 127 Ill. 231, 20 N. E. Rep. 73; s. c., 21 Ill. App. 391.

⁶⁹ *Supra*, §§ 197, 198.

⁷⁰ *Jones v. Bates*, 26 Nebr. 693, 42 N. W. Rep. 751; *Mulcahy v. Givens*, 115 Ind. 286, 17 N. E. Rep. 598.

been adjudged. But if it is covenanted in the bond that the dealer will not sell to certain persons, (as, to one whose wife has forbidden such sale,) and the condition of the bond is made to include the keeping and performance of such covenant, then the wife's right of action, upon a sale in violation of the covenant, at once accrues against principal and sureties jointly, and she need not first obtain a judgment against the principal.⁷¹ The sureties are liable for exemplary as well as compensatory damages to any amount not exceeding the bond.⁷² And where, during the existence of a license based on such bond, the principal sells to one who is disqualified to earn a support for his family by reason of his intoxication, the liability of the surety attaches, and continues throughout the period of such disqualification, whether it terminates during the license year or continues longer.⁷³ Further, principals and their sureties on license bonds are liable to an action for damages jointly with the principals and sureties on other bonds of a like character, where all the principals have contributed to the same injury.⁷⁴

§ 298. Liability of Master for Acts of Servant.

In accordance with the general principles governing the relation of master and servant, it is held that a liquor-dealer is responsible for actionable injuries under the civil damage laws, caused by sales of liquor made by his agents or servants within the general scope of their employment, though the particular sale in question was made without the knowledge or consent of the master, and even though it was made in disobedience of his general or specific orders.⁷⁵ In Illinois, however, it is held that where, in good faith, the employe of a liquor-dealer is instructed not to sell to a person who is in the

⁷¹ *Anthony v. Krey*, 70 Mich. 629, 38 N. W. Rep. 603.

⁷² *Richmond v. Shickler*, 57 Iowa, 486, 10 N. W. Rep. 882.

⁷³ *Wardell v. McConnell*, 23 Nebr. 152, 36 N. W. Rep. 278.

⁷⁴ *Wardell v. McConnell*, 23 Nebr. 152, 36 N. W. Rep. 278.

⁷⁵ *George v. Gobey*, 123 Mass. 289, 35

Am. Rep. 376; *Bodge v. Hughes*, 53 N. H. 614; *Smith v. Reynolds*, 8 Hun, 128; *Barnaby v. Wood*, 50 Ind. 405; *Keedy v. Howe*, 72 Ill. 133; *Worley v. Spurgeon*, 38 Iowa, 465; *Kreiter v. Nichols*, 28 Mich. 496; *Kehrig v. Peters*, 41 Mich. 475, 2 N. W. Rep. 801; *Gullikson v. Gjourn*, 82 Mich. 503, 46 N. W. Rep. 723.

habit of becoming intoxicated, and the servant wilfully disobeys the instructions, the principal is not liable to exemplary damages.⁷⁶ And this rule appears to be very well founded, inasmuch as, in the case supposed, the master could not be charged with malicious, wanton, or wilful conduct. And it is apparent that the general principle must be restricted to the case of persons actually in the employment of the defendant or in some way authorized by him to make the sales complained of. If the liquor was dispensed by a mere volunteer or trespasser, meddling with defendant's property without any permission or authority, the defendant cannot be held responsible, even though he afterwards demands and receives payment for the liquor.⁷⁷ Where the statute provides that "*any person* who shall . . . cause the intoxication of any other person" shall be liable in damages, the person who actually makes the sale of liquor is personally liable for the injurious consequences which result, whether he be the owner himself or the clerk, servant, or agent of the owner.⁷⁸

§ 299. Joint Liability.

If several persons, by selling or furnishing liquor, contribute to an intoxication which results in actionable injuries under the civil damage law, their responsibility is that of joint tort-feasors. That is, they are all jointly liable, and each is severally liable, for the entire damages; the plaintiff may proceed against any one of the wrongdoers, without any reference to the extent or degree in which his own sales contributed to the state of intoxication, or against all jointly; and a recovery against one (without satisfaction) will not bar an action against another.⁷⁹ "The cause of action under the statute is

⁷⁶ *Brantigam v. While*, 73 Ill. 561; *Keedy v. Howe*, 72 Ill. 133; *Fentz v. Meadows*, Id. 540.

⁷⁷ *Kreiter v. Nichols*, 28 Mich. 496. See, also, *Kennedy v. Sullivan*, (Ill. Sup.) 26 N. E. Rep. 382.

⁷⁸ *Worley v. Spurgeon*, 38 Iowa, 465; *Barnaby v. Wood*, 50 Ind. 405.

⁷⁹ *Bryant v. Tidgewell*, 133 Mass. 86; *Taylor v. Wright*, 126 Pa. St. 617, 17 Atl. Rep. 677; *Boyd v. Watt*, 27 Ohio St.

259; *Fountain v. Draper*, 49 Ind. 441; *O'Leary v. Frisbey*, 17 Ill. App. 553; *Buckworth v. Crawford*, 24 Ill. App. 603; *Kearney v. Fitzgerald*, 43 Iowa, 580; *Roose v. Perkins*, 9 Nebr. 304, 2 N. W. Rep. 715, 31 Am. Rep. 409; *Wardell v. McConnell*, 23 Nebr. 152, 36 N. W. Rep. 278; *Jones v. Bates*, 26 Nebr. 693, 42 N. W. Rep. 751. Compare *Jackson v. Brookins*, 5 Hun, 530; *Morenus v. Crawford*, 15 Hun, 45.

in the nature of a tort. Persons contributing to the injury may be sued jointly or separately. When jointly sued, the recovery may be against all of the defendants or against part of them only; and the judgment recovered may be reversed as to some and affirmed as to others."⁸⁰ Hence, in an action against a sole defendant, under these statutes, it is no defense for him to show that part of the liquor causing the intoxication was sold by others, if he furnished the rest.⁸¹ At the same time, it must be remembered that a defendant is only liable for damages resulting from the particular act or state of affairs to which he contributed, notwithstanding it may be difficult to separate from them the damages to which he did not contribute.⁸² It therefore makes an important difference whether the injury complained of is the result of one specific state of intoxication, or is a particular grievance or injury preceded and induced by a condition of habitual intemperance. For example, if one continuous debauch ends in a disaster, all the sellers who have furnished liquor to the drunkard during its progress are liable for the result. A dealer who furnishes liquor to a partially intoxicated person is liable for that person's death resulting from intoxication a few hours later, although, during the interval, he drank at other saloons.⁸³ "In such a case," says the court in Pennsylvania, "it would be impossible for the jury to say which particular glass of liquor was the proximate cause of his death. Each glass did its share of the work."⁸⁴ But on the other hand, where the injury complained of proceeds not from a particular state of intoxication, but rather from a general besotted condition, those who may have contributed to such condition by the sale of liquors are not jointly liable with those who may have contributed to the immediate act.⁸⁵ Thus, where a woman sued in one

⁸⁰ Reugler v. Lilly, 26 Ohio St. 48.

⁸¹ Woolheather v. Risley, 38 Iowa, 486; Hackett v. Smelsley, 77 Ill. 109; Werner v. Edmiston, 24 Kans. 147.

⁸² Huggins v. Kavanagh, 52 Iowa, 368, 3 N. W. Rep. 409; Flint v. Gauer, 66 Iowa, 696, 24 N. W. Rep. 513. In an action under the civil damage law, an instruction that if defendant sold the liquor which, with that sold to plaintiff's husband by others, produced "fits

of intoxication," he was liable for all the damage caused, was *held* erroneous, as each seller was only liable severally for his own acts. Richmond v. Shickler, 57 Iowa, 486, 10 N. W. Rep. 882.

⁸³ Mayers v. Smith, 25 Ill. App. 67; affirmed, 121 Ill. 442, 13 N. E. Rep. 216.

⁸⁴ Taylor v. Wright, 126 Pa. St. 617, 17 Atl. Rep. 677.

⁸⁵ Hitchner v. Ehlers, 44 Iowa, 40.

action several liquor-dealers to recover damages caused by the demoralization and death of her husband, he having long been addicted to drinking, and having lost his life from an accident resulting from his intoxication, it was held that the fact of his being an habitual drunkard could not be deemed, in a legal sense, the cause of his death, although but for that he might not have drunk the liquor which intoxicated him on the day of his death; and that the dealers who contributed to his habitual intoxication could not be jointly sued with those who caused the particular intoxication resulting in his death.⁸⁶ But if the plaintiff's cause of action is not founded upon a specific act of injury resulting from a particular fit of intoxication, but upon injury to her property or means of support caused by the habitual drunkenness of her husband, extending over a period of time, then all the dealers who furnish him with liquor during such time, knowing his habit of intemperance, and whose sales contribute to keep up such habit, are liable for the damages, though there was no concert or connection between them.⁸⁷

§ 300. Plaintiff can have but one Satisfaction.

The party having a cause of action under the civil damage law may elect to proceed severally or jointly against the persons who caused the intoxication, but there can be but one satisfaction for the injury. A recovery and satisfaction by the party injured against one would constitute an effectual bar to any recovery against another who may have in part contributed to cause the intoxication.⁸⁸ And when separate judgments have been recovered against the several parties liable, the plaintiff must elect upon which of the judgments he will rely, as a lien on the premises where the sale took place, as the satisfaction of one judgment will discharge the rest.⁸⁹ But if the causes

⁸⁶ *Tetzner v. Naughton*, 12 Ill. App. 148.

⁸⁷ *Rantz v. Barnes*, 40 Ohio St. 48; *Cox v. Newkirk*, 73 Iowa, 42, 34 N. W. Rep. 492; *Arnold v. Barkalow*, 73 Iowa, 183, 34 N. W. Rep. 807. See *Kirchner*

v. Myers, 35 Ohio St. 85, 35 Am. Rep. 598.

⁸⁸ *Emory v. Addis*, 71 Ill. 273; *Comstock v. Hopkins*, (Sup.) 15 N. Y. Supp. 908. See 2 Black, Judgm. § 782.

⁸⁹ *Putney v. O'Brien*, 53 Iowa, 117, 4 N. W. Rep. 891.

of action in two suits brought against different defendants are in fact distinct, although the declarations are identical in form, the acceptance, by the plaintiff, of a sum of money in satisfaction and discharge of the cause of action in one suit will be no defense in the other case.⁹⁰ Under a statute giving an action, either severally or jointly, against the person or persons contributing to the intoxication of another by selling or giving him liquor, in favor of the party injured thereby, it is held that a *release* of one person against whom such a demand exists, by the payment of a sum of money, is a release of another liable for the same injury, although their liability arose from independent and distinct sales, having no connection with each other.⁹¹ Where the local practice allows a plaintiff, having obtained a verdict against two jointly and severally liable, to dismiss as to one and take judgment against the other, this course may be pursued in an action against two under the civil damage law.⁹²

§ 301. Liability of Lessor of Premises.

In many of the states, the civil damage laws provide that the owner or lessor of property, who knowingly permits the sale of liquor on the premises, shall be liable for all actionable injuries caused by such sale on the premises. Although the cause of action is the causing or contributing to the intoxication of a person, whether done by selling liquor or owning the building in which liquor is sold or kept for illegal sale with the knowledge of the owner,⁹³ yet the saloon-keeper and the owner of the premises are not to be regarded as joint tort-

⁹⁰ *Miller v. Patterson*, 31 Ohio St. 419. And in such action, evidence that plaintiff has commenced another similar action against another liquor-seller, for damages accruing during the same period, is not admissible. *Ward v. Thompson*, 48 Iowa, 588.

⁹¹ *Aldrich v. Parnell*, 147 Mass. 409, 18 N. E. Rep. 170. *Per contra*, *Jewett v. Wanshura*, 43 Iowa, 574. But the court in Massachusetts, in the case cited, distinguished *Jewett v. Wanshura*, on the ground that the Iowa statute gave no

joint right of action, and the court, in the case referred to, held that in the circumstances of the case, no joint action would lie, because the sales by the several parties were on separate days, and that each seller was only liable for the injury produced by his own acts. *Kearney v. Fitzgerald*, 43 Iowa, 580, was cited in support of this distinction.

⁹² *Buckworth v. Crawford*, 24 Ill. App. 603.

⁹³ *McGee v. McCann*, 69 Me. 79.

feasors.⁹⁴ And although the two persons may be joined as defendants in one action,⁹⁵ yet this is not absolutely necessary; but an action may be first prosecuted to judgment against the saloon-keeper, and the judgment afterwards established as a lien on the premises in a suit against the landlord.⁹⁶ This provision in the statute, it is held, does not apply to the owner of property who himself sells liquor therein, but applies to owners who permit others to occupy and use the property for such purposes.⁹⁷ And it should not be construed to make liable those having only reversionary or contingent interests in the property, and who do not control the letting.⁹⁸ A wife owning a building and knowingly permitting her husband to carry on the business of selling intoxicating liquors therein, is liable under the civil damage act, even though her title and the joint possession were acquired before the passage of the act; because it is presumed that the possession originally taken was continued in view of the laws of the state thereafter enacted.⁹⁹ And one who, subsequent to the commencement of an action for damages for the unlawful sale of liquors, purchases from a party defendant real property upon which a lien is sought to be established, takes the same subject to the judgment that may finally be recovered against such owner therein.¹⁰⁰ But the statute does not apply to the owner of a steamboat navigating a river, which has a bar-room on board where the sales complained of were made. Such a vessel is not within the meaning of the words "building or premises" as used in the act.¹⁰¹ Where the action is brought jointly against the seller and his landlord, the latter, in the absence of any evidence to show that he had knowledge of the circumstances under which the particular sale was made, is held, in some states, not liable to pay exemplary damages.¹⁰² But in other states, the act

⁹⁴ *McVey v. Marratt*, 80 Iowa, 132, 45 N. W. Rep. 548.

⁹⁵ *Jackson v. Brookins*, 5 Hun, 530; *La France v. Krayner*, 42 Iowa, 143; *Buckham v. Grape*, 65 Iowa, 535, 17 N. W. Rep. 755.

⁹⁶ *McVey v. Marratt*, 80 Iowa, 132, 45 N. W. Rep. 548.

⁹⁷ *Barnaby v. Wood*, 50 Ind. 405.

⁹⁸ *Castle v. Fogerty*, 19 Ill. App. 442.

⁹⁹ *Mead v. Stratton*, 87 N. Y. 493, 41 Am. Rep. 386.

¹⁰⁰ *O'Brien v. Putney*, 55 Iowa, 292, 7 N. W. Rep. 615.

¹⁰¹ *Rouse v. Catskill & N. Y. Steam-Boat Co.* (Sup.) 13 N. Y. Supp. 126, 35 N. Y. St. Rep. 491.

¹⁰² *Ketcham v. Fox*, 52 Hun, 284, 5 N. Y. Supp. 272. Compare *Reid v. Terwilliger*, 42 Hun, 310.

expressly declares that he shall be liable to such damages. And if the provision is merely for the enforcement against his property of the judgment recovered against the tenant, it is of course immaterial whether or not punitive damages enter into the composition of the judgment.

§ 302. Knowledge and Consent of Owner.

Under the statutory provisions adverted to in the last section, the knowledge and consent of the owner, in relation to the use of his premises for the sale of liquor, should not be left to mere inference or conjecture, but should be established by clear and satisfactory proof.¹⁰³ This, however, does not preclude the use of circumstantial evidence to show these facts. And where the owner or his agent, knowing the entire business carried on to be unlawful, consents to the use of the property for such purpose, the property is liable, though neither of them knew of the particular sales complained of.¹⁰⁴ Where the evidence showed that complainant's husband was a notorious drunkard, and was habitually drunk on the streets and in the saloon, and that the owner lived near the saloon and sometimes visited it, this was held sufficient to show the knowledge and consent of the owner.¹⁰⁵ So the plaintiff may prove that the tenant was indebted to the landlord for liquors and for rent, to show their business relations.¹⁰⁶ The knowledge of the owner may also in some cases be constructive or imputed. Thus, a wife, whose husband rents the premises to a liquor-dealer and looks after the property for her, is chargeable with his knowledge that intoxicating liquors are being sold on the premises contrary to law.¹⁰⁷ So where the owner resides in another place, and leaves the entire management and control of the premises to a resident agent, and has no personal knowledge of the purpose for which the property is being used, still if the agent

¹⁰³ Mead v. Stratton, 8 Hun, 148; Myers v. Kirt, 64 Iowa, 27, 19 N. W. Rep. 846.

¹⁰⁴ Wing v. Benham, 76 Iowa, 17, 39 N. W. Rep. 921.

¹⁰⁵ McVey v. Marratt, 80 Iowa, 132, 45 N. W. Rep. 548.

¹⁰⁶ Campbell v. Schlesinger, (Sup.) 1 N. Y. Supp. 220, 16 N. Y. St. Rep. 435.

¹⁰⁷ Johnson v. Griminger, (Iowa,) 48 N. W. Rep. 1052.

knows that the building is used as a liquor-saloon, the same knowledge is imputable to the principal.¹⁰⁸ Besides the knowledge of the owner of the premises, it is also necessary, under these statutes, to show his consent to the use of the property as a liquor-saloon.¹⁰⁹ And such consent is not necessarily established by proof of circumstances tending to show knowledge merely.¹¹⁰ Yet it need not be shown by any positive affirmative act, but may be inferred from circumstances, and from knowledge of the illegal sales under such conditions as properly to call forth a protest, and a failure to make any objection.¹¹¹ Where a joint action is brought against the seller of the liquor and the owner of the premises, the latter is entitled to a trial by jury to determine whether he consented to or had knowledge of the sale.¹¹²

§ 303. Establishment of Lien on Premises.

In Iowa, the code provides that fines, costs, and judgments against any person for the unlawful sale of liquor shall be a lien on all property used or occupied for such purposes with the owner's knowledge. No lien attaches, it is held, until the fines or costs are assessed, or the judgments rendered, and an injunction on the sale of property alleged to have been so used and occupied, pending proceedings for unlawful sales, should be dissolved.¹¹³ The judgment against the saloon-keeper is not evidence of the amount to which the property of the landlord should be subjected, and, in order to prove the landlord's liability as great as the amount of the judgment, it is not necessary to prove all the facts that went to make up the judgment, if such liability is established by other facts.¹¹⁴ The property may become liable by reason of sales made prior to the time when it was shown the owner first learned of the sales; for the statute does not

¹⁰⁸ Hall v. Germain, (Sup.) 14 N. Y. Supp. 5.

¹⁰⁹ Meyers v. Kirt, 57 Iowa, 421, 10 N. W. Rep. 828.

¹¹⁰ Cox v. Newkirk, 73 Iowa, 42, 34 N. W. Rep. 492.

¹¹¹ Loan v. Etzel, 62 Iowa, 429, 17 N. W. Rep. 611.

¹¹² Loan v. Hiney, 53 Iowa, 89, 4 N. W. Rep. 865.

¹¹³ Bonesteel v. Downs, 73 Iowa, 685, 35 N. W. Rep. 924.

¹¹⁴ McVey v. Marratt, 80 Iowa, 132, 45 N. W. Rep. 548.

contemplate that the judgment may be split up and a part only charged as a lien on the building.¹¹⁵ It is also held that the front part of a house that is a homestead, used by the husband of the owner, with her consent, as a liquor-saloon, is not exempt from the lien of a judgment recovered under the civil damage laws.¹¹⁶ In Ohio, it is held that the lien of a judgment recovered under the liquor law of 1870 is limited to the real estate of the judgment-debtor; and the judgment-creditor acquires no interest in the property not owned by the judgment-debtor, until the commencement of the suit to subject the same to the payment of the judgment.¹¹⁷

PART IV. THE CAUSE OF ACTION.

§ 304. Elements of the Right of Action.

Under the civil damage laws of the more usual type, any person may maintain an action for injuries of a certain character suffered by or inflicted upon him, through the intoxication of a third person, or by the acts of such person while drunk, when the intoxication was caused, entirely or in part, by liquor furnished by the defendant.¹¹⁸ But as the action is statutory, all the statutory requisites must be present before the suit can be sustained. Thus, there must be a "sale," "gift," or "furnishing" of liquor, according to the terms of the act. If, for instance, an action is given against one who shall "sell or give" liquor to a minor, it does not apply to the case of liquor

¹¹⁵ *Arnold v. Barkalow*, 73 Iowa, 188, 34 N. W. Rep. 807.

¹¹⁶ *Arnold v. Gotshall*, 71 Iowa, 572, 32 N. W. Rep. 508. In this case it was said: "A part of the premises and building upon and in which a family reside, which is not used for the purposes of a homestead, is not exempt from a judgment against the owner; that is, a building and the lot on which it is situated may be partly a homestead, and partly subject to execution, depending upon the purposes for which the respective parts are used. . . . Code, § 1988, declares that 'where there is no special

declaration of the statute to the contrary, the homestead of every family, whether owned by husband or wife, is exempt from judicial sale.' In our opinion, Code, § 1566, is a 'special declaration of the statute' to the effect that a homestead, or a part of a homestead, used as a saloon, is subject to judgments obtained for violations of the laws against the sale of intoxicating liquors."

¹¹⁷ *Bellinger v. Griffith*, 23 Ohio St. 619.

¹¹⁸ *Schafer v. State*, 49 Ind. 460.

delivered to a minor but ordered and paid for by another person.¹¹⁹ Again, the fact that defendant has continually sold liquor to plaintiff's husband against her request is not enough to give her a right of action; the intoxication of the husband must have been caused to the plaintiff's damage.¹²⁰ And the liquor sold must contribute to the particular intoxication by which the plaintiff sustains injury.¹²¹ Further, if the statute defines the classes of injuries for which an action will lie, the particular case must be shown to involve an injury of one or other of these classes, otherwise no recovery can be had.¹²² But it is not necessary, in order to maintain a suit under the civil damage law, against the seller of liquors, that an action should also be maintainable against the intoxicated person on the same state of facts.¹²³

§ 305. Illegality of Sale Necessary to Found Action.

In several of the states, (though not in all,) the civil damage laws make it an essential prerequisite to the maintenance of an action thereunder that the sale or furnishing of liquor causing the intoxication complained of should have been *illegal*, that is, contrary to the provisions of some statute of the state.¹²⁴ In Indiana, where the right of action is given against any person who shall sell, barter, or give away any intoxicating liquors "in violation of any of the provisions of this act," it is held that the provision in question cannot be extended by construction to include violations of other statutes passed since it went into effect.¹²⁵

§ 306. Injuries to Person.

The civil damage laws specify "injuries to the person" as one of the causes for which an action may be maintained against the liquor-

¹¹⁹ St. Goddard v. Burnham, 124 Mass. 578.

¹²⁰ McEntee v. Spiehler, 12 Daly, 435.

¹²¹ Welch v. Jugenheimer, 56 Iowa, 11, 8 N. W. Rep. 673.

¹²² Fentz v. Meadows, 72 Ill. 540.

¹²³ Quain v. Russell, 8 Hun, 819.

¹²⁴ Sibila v. Bahney, 34 Ohio St. 399;

Baker v. Beckwith, 29 Ohio St. 314; Granger v. Knipper, 2 Cin. R. 480; Myers v. Conway, 55 Iowa, 166, 7 N. W. Rep. 481; Peacock v. Oaks, (Mich.) 48 N. W. Rep. 1082.

¹²⁵ State v. Cooper, (Ind. Sup.) 13 N. E. Rep. 861.

seller. It is held that an action cannot be sustained, under this clause, without showing an assault upon the plaintiff by the intoxicated person, or some actual violence, or some physical injury to the person or the health; and it is not sufficient to show mere mental anguish, disgrace, or a loss of society or companionship.¹²⁶ Thus, abuse of a wife by cursing her, when under the influence of liquor,¹²⁷ or calling her a prostitute in the presence of her neighbors and threatening to kill her,¹²⁸ does not constitute a ground for the recovery of damages against the liquor-seller, unless it is further shown that such conduct injured or impaired her health. But on the other hand, where an intoxicated husband, without actual violence, but by abusive language and intimidation, drove his wife out of the house and kept her out for several hours, it was held that she had been injured in her person, so as to sustain the action, and that, a substantial ground of action being thus shown, she might also recover for the injury to her feelings from the indignity suffered by her.¹²⁹ And of course, if the husband, while drunk, assaults and beats his wife, it is plain that she has a cause of action, under the clause in question, against the saloon-keeper who furnished him with liquor.¹³⁰ It is further to be remarked that a stranger who is injured in his person by the violent or reckless conduct of a drunken man, as by being set upon or beaten, or shot and wounded, has a right to recover damages against the person or persons who supplied the liquor which caused the intoxication.¹³¹

§ 307. Injuries to Property.

Another ground of action specified by the civil damage laws is "injury to property." Under this clause, an action will lie against a vendor of liquor by a married woman for damages sustained by her by reason of her money being spent by her husband for liquor, or squandered by him while intoxicated, or in the saloon of the liquor-

¹²⁶ Mulford v. Clewell, 21 Ohio St. 191.

¹²⁷ Albrecht v. Walker, 73 Ill. 69.

¹²⁸ Calloway v. Laydon, 47 Iowa, 456,
29 Am. Rep. 489.

¹²⁹ Peterson v. Knoble, 35 Wis. 80.

¹³⁰ Wilson v. Booth, 57 Mich. 249, 23
N. W. Rep. 799.

¹³¹ King v. Haley, 86 Ill. 106, 29 Am.
Rep. 14; English v. Beard, 51 Ind. 489;
Bodge v. Hughes, 53 N. H. 614.

seller.¹³² So if a wife has a horse which she claims and uses as her own with the knowledge of her husband, and he sells it while drunk, and squanders the proceeds, she may recover its value from the seller of the liquor causing the intoxication.¹³³ On the same principle, if the husband takes the wife's chattels and sells them to the liquor-dealer, she may maintain an action against the latter; and it is not necessary that she should first have demanded the return of the property, or notified the defendant that she claimed it as her own; because the action is not for the defendant's conversion of the property, but for the husband's conversion of it while under intoxication caused by defendant; the wrongful act of the defendant is not the conversion of the goods, but the sale of the liquor.¹³⁴ In a recent case in the supreme court of New York—*Streever v. Birch*, (Sup.) 17 N. Y. Supp. 195,—it appeared that plaintiff entered into a verbal contract with an infant to provide him with board, medical attendance, care in case of sickness, etc., in consideration of services to be rendered during his minority. While working under such contract, the infant, being intoxicated by liquor furnished by defendant, fell and was seriously injured, and in consequence of such injury was incapacitated for services for a long time, during which time plaintiff duly cared for him under his contract. It was held that, as the contract with the infant was executory and not enforceable, and plaintiff could recover from the infant for the necessities furnished, an action would not lie by the plaintiff under the civil damage law during the infant's minority, plaintiff not being injured in his "property" within the meaning of the statute.

§ 308. Injuries to Means of Support.

The third ground of action provided for by the civil damage laws is injury to the plaintiff's "means of support." This, it is said, creates a new right of action; and it is not necessary, to sustain such an action, that the injury alleged should be a common law

¹³² *Greenlee v. Schoenheit*, 23 Nebr. 669, 37 N. W. Rep. 600.

¹³³ *Woolheather v. Risley*, 38 Iowa, 486.

¹³⁴ *Mulford v. Clewell*, 21 Ohio St. 191.

injury or one previously remediable by suit.¹³⁵ In regard to the phrase quoted, it has been remarked: "This phrase was in common use at the time and long before the passage of this statute. It then was and still is as well understood as most words and phrases in the English language. It is commonly used in the plural form, but often in a singular sense. In its general sense, it embraces all those resources from which the necessities and comforts of living are or may be supplied, such as lands, goods, salaries, wages, or other sources of income. In its limited sense, it signifies any resource from which the wants of life may be supplied."¹³⁶

In the discussion of this subject, it is first necessary to remark that a wife has an interest in her husband's capacity to perform labor as a means of support. And if his intoxication, habitual or otherwise, so impairs or destroys his powers and faculties as to incapacitate him and render him unable to labor, or results in accidents or injuries which produce the same result, then the wife is injured in her means of support, so as to be able to maintain an action under the statute.¹³⁷ And in such action, she may show, as bearing on the question of damages, that the husband was unable to obtain employment, in consequence of habits of intoxication caused by defendant's acts.¹³⁸ So where a drunken man commits a murder, and is convicted and sentenced to imprisonment for life, the wife may recover damages from the dealer who sold him the liquor.¹³⁹ The same principle applies if the husband, without being incapacitated for labor, falls into such idle and dissolute habits and so neglects his opportunities for earning money, by reason of his addiction to drink, that his family, having no other resources, become objects of public charity.¹⁴⁰

In the next place, a married woman has the right to rely upon being supported by her husband, and is entitled to damages from the person who injures her in her means of support by the sale of liquor

¹³⁵ Volans v. Owen, 74 N. Y. 526, 30 Am. Rep. 337.

¹³⁶ Schneider v. Hosier, 21 Ohio St. 98.

¹³⁷ Schneider v. Hosier, 21 Ohio St. 98; Volans v. Owen, 74 N. Y. 526, 30 Am.

Rep. 337; Elshire v. Schuyler, 15 Nebr. 561, 20 N. W. Rep. 29.

¹³⁸ Roth v. Eppy, 80 Ill. 293.

¹³⁹ Beers v. Walhizer, 43 Hun, 254.

¹⁴⁰ Jockers v. Borgman, 29 Kans. 109, 44 Am. Rep. 625.

to her husband, irrespective of his conduct, as regards habits of industry or idleness, previous to such sales.¹⁴¹ Even though, for many years, he has been an habitual drunkard and has contributed nothing to her support, still she is not precluded from maintaining her action.¹⁴² And the fact that the wife has independent means of her own, or is able-bodied and can earn a livelihood for herself, will not defeat her right of action against a person who sells liquor to her husband which causes his intoxication and death, and thus deprives her of her legal supporter.¹⁴³ But of course if, at the time of the husband's death, the plaintiff was in fact supported by his labor and had no other means of support, evidence of the fact is proper and admissible.¹⁴⁴ And as she is required to show that, during the period of the sales complained of, she was deprived, in whole or in part, of the support of her husband, evidence that she was supported by herself and by the county is material.¹⁴⁵

As concerns the degree in which the resources of a family must be reduced before it can be said that the wife and children are injured in their means of support, it is to be observed that "support" includes more than mere board, lodging, and clothing. Although the bare necessities of life may remain, it does not follow that the means of support are not impaired. Neither beggary nor a mere subsistence is the point at which the right of action begins. It is true, as remarked by the court in Illinois, that the law was not intended as a means of speculation, but as a protection against injury to the wife and children of the drunkard, to preserve the property used by the family from destruction or injury, and to protect the family against immediate or probable want of adequate support; not to enable the affluent, or those well provided for, to sue and recover, merely because the husband and father becomes intoxicated, and, while in that con-

¹⁴¹ *Woolheather v. Risley*, 38 Iowa, 486.

¹⁴² *Rouse v. Melsheimer*, 82 Mich. 172, 46 N. W. Rep. 372.

¹⁴³ *Hackett v. Smelsley*, 77 Ill. 109. But on the question of whether or to what degree a woman is injured in her means of support, by reason of defendant's

sales of liquor to her husband, causing his intoxication and death, it may be shown that she has since married again. *Sharpley v. Brown*, 43 Hun, 374.

¹⁴⁴ *Mayers v. Smith*, 121 Ill. 442, 13 N. E. Rep. 216.

¹⁴⁵ *Fox v. Wunderlich*, 64 Iowa, 187, 20 N. W. Rep. 7.

dition, loses time, neglects his business, or becomes injured, or earns less money, and hence is not possessed of as large means as he otherwise would have been.¹⁴⁶ But it is equally true that a wife's right of support is not limited to the bare necessities of life, but embraces comforts suitable to her situation and her husband's condition in life. "The loss of those comforts which are suitable to her condition in life is as much an injury to the wife's means of support as the loss of the necessities of existence."¹⁴⁷

In an action of this character, the plaintiff's husband may properly be permitted to state about how much he had paid the defendant for liquors during the time for which damages are sought to be recovered, as a fact tending to show the injury the wife has received in her means of support.¹⁴⁸ And the wife may testify as to the amount per week necessary to support the family comfortably; for while such evidence would not be competent as establishing the measure of damages, yet it would be competent as tending to inform the jury as to the value of the means of support of which the plaintiff had been deprived.¹⁴⁹

Finally, it is proper to add that although actions for injuries to the means of support are most usually brought by the wives of drunkards, such right of action is by no means confined to such persons, but extends to all who come within the conditions of the statute. Minor children, for instance, dependent upon their parent, are clearly entitled to maintain a suit for this cause. And it is held that a husband may maintain an action for injury to his means of support by the loss of his wife's services caused by her intoxication.¹⁵⁰ So also, where the employes of railroad contractors become intoxicated with liquor furnished by defendants, so as to be unable to work and so as to interfere with the labor of their fellow-servants, it is said that the employers are injured in respect to their means of

¹⁴⁶ *Confrey v. Stark*, 73 Ill. 187.

¹⁴⁷ *McMahon v. Sankey*, (Ill. Sup.) 24 N. E. Rep. 1027; *Hackett v. Smelsley*, 77 Ill. 109; *Thill v. Polman*, 76 Iowa, 638, 41 N. W. Rep. 385.

¹⁴⁸ *Ward v. Thompson*, 48 Iowa, 588; *Horn v. Smith*, 77 Ill. 381.

¹⁴⁹ *Warrick v. Rounds*, 17 Nebr. 411, 22 N. W. Rep. 785.

¹⁵⁰ *Moran v. Goodwin*, 130 Mass. 158, 39 Am. Rep. 443.

support, and are entitled to recover damages.¹⁵¹ And many other cases might be supposed in which third persons would be thus damaged.

§ 309. Disgrace and Mental Suffering.

As the civil damage laws, in general, give redress only for injuries to the person, property, or means of support, the courts are compelled to hold that actions cannot be sustained except upon a showing of some one of these injuries. Mortification, sorrow, anxiety, shame, mental suffering, disgrace, loss of society or companionship,—these, poignant or severe as they may be, do not constitute a principal cause of action under these statutes, and for these alone no damages are recoverable.¹⁵² But if a cause of action falling within the statute has been established, and substantial ground shown for the recovery of compensatory damages, then the mental sufferings of the plaintiff, resulting from or connected with the principal cause of action, may properly be taken into account as a ground for the award of exemplary damages.¹⁵³ Indisputably this is the rule where the statute itself allows for the recovery of punitive damages. Thus, under such a statute, it is held that a wife, as plaintiff, may show that she has been excluded from society on account of her husband's intemperate habits, and may give evidence of her mental sufferings generally caused by his drunkenness.¹⁵⁴ And it is clear also that the plaintiff can recover for her mental suffering *resulting* from being beaten by her intoxicated husband, being repeatedly thrust violently out of doors by him, and compelled to stay out all night, as these things constitute injuries to her person within the statute.¹⁵⁵ In a case of this character, the supreme court of Wisconsin, after noticing the general rule as stated at the beginning of this section, remarked: "But in this case we have that physical injury and suffering, namely, the turning the wife out

¹⁵¹ Duroy v. Blinn, 11 Ohio St. 331.

¹⁵² Mulford v. Clewell, 21 Ohio St. 191; Koerner v. Oberly, 56 Ind. 284, 26 Am. Rep. 34; Brantigan v. While, 73 Ill. 561; Freese v. Tripp, 70 Ill. 496; Flynn v. Fogarty, 106 Ill. 263; Kearney v. Fitzgerald, 43 Iowa, 580; Jackson v. Noble, 54 Iowa, 641, 7 N. W. Rep. 88; Welch

v. Jugenheimer, 56 Iowa, 11, 8 N. W. Rep. 673; Clinton v. Laning, 61 Mich. 355, 28 N. W. Rep. 125; Johnson v. Schultz, 74 Mich. 75, 41 N. W. Rep. 865.

¹⁵³ Pegram v. Stortz, 31 W. Va. 220, 6 S. E. Rep. 485.

¹⁵⁴ Friend v. Dunks, 37 Mich. 25.

¹⁵⁵ Ward v. Thompson, 43 Iowa, 588.

of doors and keeping her there some hours, which suffices to sustain the action; and where the action is so sustainable, then we understand that compensation for injury to the feelings of the plaintiff, and for the indignity suffered by reason of the principal act complained of and as a part of that act, constitute a portion of the actual damages in the action which the plaintiff is entitled to recover. If a stranger, and not the husband, had been guilty of the act of turning the plaintiff out of doors and keeping her out, such compensation would have been recoverable as part of the actual damages; and it was the intention of the statute, no doubt, to give the same or an equivalent remedy against the person who sold the liquors, and by whose fault, in the statutory point of view, the injuries were caused."¹⁵⁶

§ 310. Death of Husband as Ground of Action.

It has been held that, in an action under the civil damage laws, no damages can be awarded to the plaintiff for injury to her means of support by reason of the *death* of her husband caused by his intoxication, the consequence of the defendant's furnishing him with liquor.¹⁵⁷ But this doctrine, though supported by the decisions of several eminent courts, cannot be regarded as in accordance either with the weight of authority or the best legal reasoning. The statute gives an action for injury to the plaintiff's means of support. The husband's capacity to labor and to earn a living is the means to which the wife is legally entitled to look for her support. Death deprives him of this capacity. If, then, his death was a consequence of his intoxication, it seems too plain for argument that the person who caused the intoxication has inflicted an injury upon the wife's means of support. And if this is true, it cannot be denied that she is entitled to recover damages, not indeed for the death, but for the consequent injury to her means of support. And the majority of the decisions are to the effect that if these elements are present,—the

¹⁵⁶ Peterson v. Knoble, 35 Wis. 80.

¹⁵⁷ Pegram v. Stortz, 31 W. Va. 220, 6 S. E. Rep. 485; Davis v. Justice, 31 Ohio St. 359, 27 Am. Rep. 514; Kirch-

ner v. Myers, 35 Ohio St. 85, 35 Am. Rep. 598; Barrett v. Dolan, 130 Mass. 366, 39 Am. Rep. 456; Harrington v. McKillop, 132 Mass. 567.

furnishing of liquor by the defendant, the intoxication of the husband, and the latter's death in consequence of such intoxication,—the widow may maintain an action for injury to her means of support and recover damages therefor.¹⁵⁸ As observed by the court in New York: "If the injury which had resulted to the deceased in consequence of his intoxication had disabled him for life, or to such an extent as to incapacitate him for labor and for earning a support for his family, it would no doubt be embraced within the meaning and intent of the statute. That death ensued in consequence thereof, furnishes much stronger ground for a claim for a loss of means of support; and a different rule in the latter case would make provision for the lesser and temporary injury, while that which was greatest and most serious would be without any remedy or means of redress. Such could not have been the intention of the law-makers, and the statute was designed to embrace and most manifestly cover and include all injuries produced by the intoxication, and which legitimately result from the same. If it is an injury which can be repaired by damages, as that arising from a temporary disability, or one where death comes as a natural and legitimate consequence of the intoxication, a case is made out within the statute which entitles the injured party to recover such damages."¹⁵⁹ But the considerations which have chiefly hindered some of the courts from reaching right conclusions on this subject are, that the common law did not recognize the death of a human being as an actionable injury, whatever interest in his life the plaintiff may have had, and that, by way of innovation on the common law, the statutes modelled on Lord Campbell's Act have provided a remedy for death caused by negligence or wrongful act, which remedy must be regarded as exclusive. But there are two answers to this position: The first is, that if the civil damage law can

¹⁵⁸ *Mead v. Stratton*, 87 N. Y. 493, 41 Am. Rep. 386, (explaining and limiting *Hayes v. Phelan*, 4 Hun, 733, and *Brookmire v. Monaghan*, 15 Hun, 16;) *McCarthy v. Wells*, 51 Hun, 171, 4 N. Y. Supp. 672; *Davis v. Standish*, 26 Hun, 608; *Emory v. Addis*, 71 Ill. 273; *Hackett v. Smelsley*, 77 Ill. 109; *Schroder v. Craw-*

ford, 94 Ill. 357, 34 Am. Rep. 236; *Flynn v. Fogarty*, 106 Ill. 263; *Rafferty v. Buckman*, 46 Iowa, 195; *Brockway v. Patterson*, 72 Mich. 122, 40 N. W. Rep. 192; *Roose v. Perkins*, 9 Nebr. 304, 2 N. W. Rep. 715, 31 Am. Rep. 409.

¹⁵⁹ *Mead v. Stratton*, 87 N. Y. 493, 41 Am. Rep. 386.

be so construed, without violence to its terms, as to admit of redress for a confessedly grave and serious injury, it would be a gross failure of justice to limit its application to less important injuries, merely because the graver wrong was not provided for by that very fragmentary and incomplete system known as the common law. The second answer is presented in the following language by the court in Illinois, used with reference to the statute giving an action for death caused by wrongful act: "That statute gives an action only where the wrongful act causing the death is such as would, if death had not ensued, have entitled the *party injured* to maintain an action and recover damages in respect thereof. In this case, had not death ensued, S., the deceased husband, could not have maintained an action against defendants for selling him the liquor which, as alleged, produced the intoxication whereby he came to his death."¹⁶⁰

§ 311. Intoxication as Cause of Death.

If the plaintiff, in an action under the civil damage laws, is to recover for injuries to the means of support resulting from the death of the intoxicated person, it is clear that the intoxication must have been the cause of the death. But it is not necessary that it should have been the *immediate* cause. That could happen only in case the liquor acted as a poison and killed the man. It is sufficient if the intoxication was the *proximate* cause of death.¹⁶¹ It will be remembered that "the proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. The proximate cause is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss."¹⁶² In ap-

¹⁶⁰ Hackett v. Smelsley, 77 Ill. 109.

¹⁶¹ Hart v. Duddleson, 20 Ill. App. 618; Davis v. Standish, 26 Hun, 608;

McClay v. Worrall, 18 Nebr. 44, 24 N. W. Rep. 429; Sellars v. Foster, 27 Nebr. 118, 42 N. W. Rep. 907.

¹⁶² *Ætna Fire Ins. Co. v. Boon*, 95 U.

plication to our immediate subject, we find a very clear and correct exposition of this rule in an instruction given at a trial in one of the inferior courts of New York, and approved on appeal. It is as follows: "If the proof in any case under this law shows that the intoxication was to such an extent as to deprive the man of the normal use of his faculties, either physical or mental, so that he is rendered incapable of caring for himself and of protecting himself from the results of accidents or circumstances to which he is subjected, and by reason of such deprivation of his natural powers of body or mind his death is produced by his inability to protect or defend himself against circumstances which threaten his life, it may be said in those cases, in general terms, that such intoxication is the proximate and direct cause of death. It is not necessary that the death, or the circumstances which immediately led to or produced it, should have been within the contemplation of the person who sold the liquor. It is only necessary that the liquor sold or furnished should have produced, either in whole or in part, a state of intoxication, and that that state of intoxication should have been the direct and proximate cause of death, whether the circumstances under which the death occurred were within the possible or impossible contemplation of the party who sold or furnished the liquor."¹⁶³

In accordance with this principle, it is held that if a man who is so drunk as to be unconscious of his movements, or unable to control them, wanders upon a railroad track and is run over and killed by a train, the intoxication is the cause of his death and the widow may recover damages against the liquor-seller.¹⁶⁴ So if a man in that condition loses his way in returning to his home, and is frozen to death, the result is not too remotely connected with the defendant's act in furnishing him liquor to sustain an action.¹⁶⁵ The same

S. 130: Milwaukee R. Co. v. Kellogg, 94 U. S. 474.

¹⁶³ Davis v. Standish, 26 Hun. 608.

¹⁶⁴ People v. Brumback, 24 Ill. App. 501; Schroder v. Crawford, 94 Ill. 357, 34 Am. Rep. 236; Sellers v. Foster, 27 Nebr. 118, 42 N. W. Rep. 907. The case of Collier v. Early, 54 Ind. 559, which

held a contrary doctrine, was criticised, if not explicitly overruled, in a later decision in the same state. Dunlap v. Wagner, 85 Ind. 529, 44 Am. Rep. 42.

¹⁶⁵ Curran v. Percival, 21 Nebr. 434, 32 N. W. Rep. 213. See, also, Scott v. Choep, (Nebr.) 49 N. W. Rep. 940.

rule holds where a man, too much intoxicated to save himself, is thrown from a boat into a lake and is drowned.¹⁶⁶ So where a drunken man lost his way, drove into a stream, and was drowned, it was held that if he lost his way because of the intoxication, but afterwards became sober, and, in an effort to regain the road, drove over the bank to his death, still the drowning was caused by the intoxication.¹⁶⁷ So also, if a man becomes involved in a fight with an intoxicated person and is killed, the widow may maintain an action against the saloon-keeper who furnished the slayer with liquor.¹⁶⁸ So where several persons become intoxicated and engage in an affray, in which one of them is killed, his widow is entitled to damages from the liquor-seller.¹⁶⁹ But where the intoxicated man, in consequence of abusive language used by him, is assaulted and killed by a third person, there is no liability to the wife for the death; because, in such a case, it cannot be presumed that the deceased, if sober, might not have given the same provocation.¹⁷⁰ In further illustration of the general principle, we may cite a case in New York, wherein it appeared that plaintiff's husband drank liquor at defendant's hotel and became so much intoxicated that he had to be helped into his buggy when he started for home, and he was found dead, with his leg caught under the foot-bar of the buggy, and his head hanging over between the body of the buggy and the wheel, so that it had been beaten by the wheel. It was held that these facts sufficiently established that the intoxication was the proximate cause of the death.¹⁷¹ Again, a suicide may be deemed attributable to defendant's sale of liquors, within the civil damage law.¹⁷² Where the father of the minor plaintiff, while intoxicated by liquor sold to him by the defendant, mur-

¹⁶⁶ Davis v. Standish, 26 Hun, 608.

¹⁶⁷ Kerkow v. Bauer, 15 Nebr. 150, 18 N. W. Rep. 27.

¹⁶⁸ Brockway v. Patterson, 72 Mich. 122, 40 N. W. Rep. 192; Scott v. Chope, (Nebr.) 49 N. W. Rep. 940. The case of Belding v. Johnson, (Ga.) 12 S. E. Rep. 304, *per contra*, was not ruled under a civil damage law, but under a statute allowing a recovery for death caused by crime or "criminal or other negligence."

¹⁶⁹ Jackson v. Brookins, 5 Hun, 530.

¹⁷⁰ Shugart v. Egan, 83 Ill. 56, 25 Am. Rep. 359.

¹⁷¹ Mead v. Stratton, 87 N. Y. 498, 41 Am. Rep. 386. Somewhat similar cases in Indiana, (Krach v. Heilman, 53 Ind. 517; Backes v. Dant, 55 Ind. 181,) wherein an opposite conclusion was reached, were criticised and practically overruled in Dunlap v. Wagner, 85 Ind. 529, 44 Am. Rep. 42.

¹⁷² Blatz v. Rohrback, 42 Hun, 402.

dered the plaintiff's mother and committed suicide, and the plaintiff was dependent on his father for support, it was held that the defendant was liable; as it is not necessary to show that the act of the intoxicated person was the natural, reasonable, or probable consequence of his intoxication, if in fact it was caused thereby.¹⁷³ But if the death of a party who receives an injury while intoxicated can be traced as the natural and probable result of any new or intervening cause, such as reckless exposure of himself, or amputation of the wounded limb where amputation was not necessary, the liquor-seller will not be responsible to the man's wife for his death.¹⁷⁴

§ 312. Proximate and Remote Causes of Injury.

In the case of injuries other than the death of the intoxicated person, the same rule applies which we have considered in the preceding section; that is, in order to found an action, the intoxication must have been the proximate, and not the remote, cause of the injury complained of. For example, if a man who is so much intoxicated as to be unable to control a team, is driving with his wife, and, by his mismanagement of the horses, brings about an accident, so that they both sustain injuries, the wife has a right of action against the person who sold or furnished the liquor.¹⁷⁵ So also, an action may be maintained by a third person who is wounded by the discharge of a pistol flourished by a drunken man on a train.¹⁷⁶ And where two intoxicated men engage in a scuffle, and one of them has his leg broken, his wife, who is dependent on his labor for her support, may recover damages from the vendor of the liquor.¹⁷⁷ And the liability of the defendant, in actions under these statutes, is not confined to cases of injury resulting from drunkenness, immediately and during its continuance, but extends as well to cases where the injury results from insanity, sickness, or disability induced by the

¹⁷³ *Neu v. McKechnie*, 95 N. Y. 632, 47 Am. Rep. 89.

¹⁷⁴ *Schmidt v. Mitchell*, 84 Ill. 195, 25 Am. Rep. 446.

¹⁷⁵ *Mulcahy v. Givens*, 115 Ind. 286, 17

N. E. Rep. 598; *Dunlap v. Wagner*, 85 Ind. 529, 44 Am. Rep. 42.

¹⁷⁶ *King v. Haley*, 86 Ill. 106, 29 Am. Rep. 14.

¹⁷⁷ *Thomas v. Dansby*, 74 Mich. 398, 41 N. W. Rep. 1088.

intoxication.¹⁷⁸ But on the other hand, if A.'s bar-tender sells liquor to B., and, an altercation arising, the bar-tender throws a glass at B. which misses him and injures C., the injury is not the proximate consequence of A.'s act in selling the liquor, and he is not liable to C. in damages.¹⁷⁹ So again, a wife cannot maintain an action for damages received by her by falling on a slippery sidewalk while following her intoxicated husband to see where he obtained liquor, because her fall was not the natural and proximate consequence of the husband's intoxication, although, but for that, she might not have incurred the danger.¹⁸⁰

§ 313. Caring for Intoxicated Person.

In some of the states, the statutes make the seller of intoxicating liquors liable to pay a reasonable compensation to any person who may take charge of and provide for the intoxicated person, and a stated sum per day, in addition thereto, for every day such person shall be kept in consequence of such intoxication. Under these laws it is held that one may recover such compensation for taking care of the victim while the latter is unable to take care of himself, owing to the breaking of his leg during and in consequence of the intoxication.¹⁸¹ But a physician who treats professionally a person who is injured while intoxicated does not "take charge of and provide for" such person, within the meaning of the statute in that behalf.¹⁸²

§ 314. Sale after Notice not to Sell.

The laws in force in several of the states provide that the husband, wife, parent, child, or other relative of a person who is in the habit of drinking to excess may give notice to liquor-sellers not to furnish him with liquor, and that, if the prohibition of the notice is violated, an action for damages may be maintained. A statute of this char-

¹⁷⁸ Mulford v. Clewell, 21 Ohio St. 191.

¹⁷⁹ Lueken v. People, 3 Ill. App. 375.

¹⁸⁰ Johnson v. Drummond, 16 Ill. App. 641.

¹⁸¹ Brannan v. Adams, 76 Ill. 331.

¹⁸² Sansom v. Greenough, 55 Iowa, 127, 7 N. W. Rep. 482.

acter is not repealed by a later statute which makes the same act of the liquor-dealer a misdemeanor; the two laws are not inconsistent and may well stand together.¹⁸³ The notice provided for must be served on the defendant while he is engaged in the sale of liquors for himself or for another as a business; and it is essential that, at the time the seller is served with notice, the person named in the notice should be in the habit of drinking to intoxication.¹⁸⁴ The notice, however, need not disclose the plaintiff's relationship to the one concerning whom it is given, but, if it does not, it must be shown that defendant knew that it was given by one of the persons named in the statute, and it is not sufficient that he had reasonable cause to believe that such was the case.¹⁸⁵ No great strictness is observed in regard to the form and contents of the notice. It need not follow the language of the statute, provided it gives all the necessary information and expresses the prohibition in intelligible terms. A notice by a wife to a liquor-seller as follows: "My husband has been in the habit of getting liquor here and coming home drunk. I don't want you to give him any more drink," is a sufficient compliance with the statute.¹⁸⁶ So also is a notice worded, "I hereby warn you not to harbor my husband, nor sell him any more liquor or beer, after this date, or I will put you to trouble."¹⁸⁷ And even where the notice was merely "I forbid you selling or delivering liquor to I. N. Taylor," it was held to be sufficient.¹⁸⁸ If the statute does not prescribe the mode of service of the notice, except that it shall be through a peace officer, it is not sufficient to read the notice to the liquor-dealer, but the original or a copy must be delivered to him.¹⁸⁹ In Massachusetts, under the wording of the statute, it is held that upon a declaration containing four counts, two of which allege the sale of liquor to a person having the habit of drinking to excess, after having been notified not to

¹⁸³ *State v. Cooper*, 114 Ind. 12, 16 N. E. Rep. 518.

¹⁸⁴ *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. Rep. 485.

¹⁸⁵ *Sackett v. Ruder*, (Mass.) 25 N. E. Rep. 736.

¹⁸⁶ *Kennedy v. Saunders*, 142 Mass. 9, 6 N. E. Rep. 734.

¹⁸⁷ *Tate v. Donovan*, 143 Mass. 590, 10 N. E. Rep. 492.

¹⁸⁸ *Taylor v. Carroll*, 145 Mass. 95, 13 N. E. Rep. 348.

¹⁸⁹ *Reagan v. Wooten*, (Tex. App.) 16 S. W. Rep. 546.

make such sale, and the other two counts of which allege the permitting such person to loiter on the premises, the plaintiff may recover separate damages under each count, although only one notice has been given.¹⁹⁰

PART V. DEFENSES TO ACTION.

§ 315. Defenses in General.

Actions under the civil damage laws may be defended on the ground of the absence of any of the statutory elements of a right of action; as, that the defendant did not furnish the liquor, that there was no intoxication, that the injuries complained of were not caused by the intoxication, that the plaintiff is not entitled to sue, that the plaintiff has not been injured in any manner recognized by the statute, etc. But it is not a ground of defense, nor of lessening or apportioning the damages, that the intoxication was produced, or the injury caused, in part by the acts of others than the defendant.¹⁹¹ On the other hand, since the injury must have occurred "in consequence of" the intoxication, the defendant may show that the drinker had in fact recovered from the effects of his intoxication before committing the wrong complained of. But it would not be enough to show that there *was time* for him to have so recovered in the interval.¹⁹² When the action is upon a statute imposing a penalty for selling liquor to a minor, it is no defense that the vendor, at the time of the sale, had reason to believe and did believe that the purchaser was an adult, if the statute does not provide that the selling must be knowingly done in order to create a liability.¹⁹³ In an action against the surety on a liquor-dealer's bond, it is no defense that the surety had removed from the corporate limits, and that the county treasurer had notified the principal to file a new bond and to close his saloon until he had done so.¹⁹⁴

¹⁹⁰ Kennedy v. Saunders, 142 Mass. 9, 6 N. E. Rep. 734.

¹⁹¹ Steele v. Thompson, 42 Mich. 594, 4 N. W. Rep. 536; *supra*, § 299.

¹⁹² King v. Haley, 86 Ill. 106, 29 Am. Rep. 14.

¹⁹³ McGuire v. Glass, (Tex. App.) 15 S. W. Rep. 127.

¹⁹⁴ Wright v. Treat, 83 Mich. 110, 47 N. W. Rep. 243.

§ 316. License is no Protection.

It is no defense to an action under the civil damage laws that the defendant had been duly licensed to sell intoxicating liquors. In some states, as we have seen, the sale must have been illegal in order to found an action under these laws. But a license does not legalize all sales. If the sale was made to a minor, to an inebriate, to a person already intoxicated, or after notice not to sell, the civil liability attaches notwithstanding the license. In other states, the civil damage laws take no account of the legality or illegality of the sale. And here, of course, the question of a license is entirely immaterial.¹⁹⁵ It has been attempted, in some cases, on the ground of estoppel, to defeat a wife's right of recovery under these statutes by showing that she had signed the defendant's petition for a liquor license. But this contention has not been regarded with favor by the courts. It is held that, by signing the petition, she did not consent that the party obtaining the license should sell intoxicants unlawfully or in violation of the statute, and consequently it does not bar her action; nor would it be competent evidence in mitigation of damages.¹⁹⁶

§ 317. Contributing Act or Negligence of Plaintiff.

A wife cannot recover damages from the seller of liquor, for injuries committed by her husband upon herself or her property, while he was intoxicated, if she consented or contributed to his intoxication, by purchasing liquor for him, or drinking with him, or neglecting such steps as she might have taken to prevent his intoxication.¹⁹⁷ Thus, where a wife knows that her husband has purchased a jug of whisky and is drinking immoderately, and has it in her power to prevent him from drinking in such quantity as to injure

¹⁹⁵ *Roose v. Perkins*, 9 Nebr. 304, 2 N. W. Rep. 715, 31 Am. Rep. 409; *Jones v. Bates*, 26 Nebr. 693, 42 N. W. Rep. 751.

¹⁹⁶ *Jockers v. Borgman*, 29 Kans. 109, 44 Am. Rep. 625.

¹⁹⁷ *Engleken v. Hilger*, 43 Iowa, 563;

Kearney v. Fitzgerald, Id. 580; *Elliott v. Barry*, 34 Hun, 129; *Rosecrants v. Shoemaker*, 60 Mich. 4, 26 N. W. Rep. 794; *McDonald v. Casey*, (Mich.) 47 N. W. Rep. 1104.

him, as by breaking the jug or pouring out its contents, and is not deterred by fear from doing so, but permits him to use it in great excess, from which his death ensues, she must be considered as a willing party to his conduct and instrumental in bringing the loss upon herself.¹⁹⁸ But the fact that the plaintiff bought liquor and took it home to her husband will not defeat her right of action, if she did it merely as a means of keeping him at home and preventing him from coming to worse harm by squandering his money and time in the saloons.¹⁹⁹ And the fact that she has upon other occasions authorized the sale of liquor to her husband will not prevent her recovery of damages for a particular sale, if she did not assent to that; and her giving him money to procure liquor does not show that she contributed to his intoxication, in the absence of proof that he obtained the liquor by means of such money.²⁰⁰ Where it appears that the husband, when sober, was in the habit of giving his wages to his wife, and that she sometimes let him have the money when he was drunk, the question of whether she voluntarily contributed to the injury is one of fact for the jury.²⁰¹ And the fact that plaintiff had given defendant a written order to let her husband have liquor, will not prevent a recovery, where the husband procured the order by threats of desertion and refusal to let her have money, and these facts were known to the defendant.²⁰² And in one case, when the wife had forbidden the sale of liquor to her husband, and subsequently, in his presence, gave permission for the seller to supply him with all he wanted, it was held that the seller should have inferred that she acted under coercion in giving the permission, and that he was not thereby exempted from liability.²⁰³ The fact that the wife accompanied her husband to various places and gatherings, and drank liquors with him, and that the husband kept liquors in his house, and drank the same at home, with the wife's knowledge and approval, and that all of such drinking, on the part of the husband, was with her knowledge and consent, is proper to be consid-

¹⁹⁸ Reget v. Bell, 77 Ill. 593.

¹⁹⁹ Kearney v. Fitzgerald, 43 Iowa, 580;

Ward v. Thompson, 48 Iowa, 588.

²⁰⁰ Rafferty v. Buckman, 46 Iowa, 195.

²⁰¹ Huff v. Aultman, 69 Iowa, 71, 28 N. W. Rep. 440, 58 Am. Rep. 213.

²⁰² Thomas v. Dansby, 74 Mich. 393, 41

N. W. Rep. 1088.

²⁰³ Jewett v. Wanshura, 43 Iowa, 574.

ered by the jury on the question of damages; but such facts do not necessarily constitute a bar to the action, because the wife may show in rebuttal that her husband compelled her to attend at such times and places with him, and may show any circumstances explanatory of her conduct.²⁰⁴ Similar principles apply in actions brought by others than the wives of drunkards. Thus, where plaintiff's son took plaintiff's horse, saying that he was going to see a friend some miles distant, but instead he went to defendant's restaurant and drank to intoxication, and then, being drunk, drove the horse so violently as to kill it, it was held that the plaintiff's allowing his son to take the horse, knowing the son to be of intemperate habits, was not such contributory negligence as to defeat his right of action.²⁰⁵ And defendant is liable for injuries caused by a minor intoxicated by liquor sold by defendant, though such sale was made to the minor with his father's consent.²⁰⁶

§ 318. Concurrence of Intoxicated Person.

In actions for injuries resulting from the death of a person in consequence of his intoxication, it is held that the act of the decedent in taking the liquor offered to him while intoxicated is not such concurring negligence in him as would relieve the defendant from liability in damages, for it was not a responsible concurrence, and the statute, which makes it a misdemeanor to furnish liquor to an inebriate, does not make the drunkard responsible for accepting the liquor furnished, nor take any notice whatever of his act.²⁰⁷

PART VI. PLEADINGS IN THE ACTION.

§ 319. Allegations of Complaint.

The declaration or complaint, in an action under the civil damage laws, must allege that the intoxication complained of was caused by

²⁰⁴ *Hackett v. Smelsley*, 77 Ill. 109.

²⁰⁵ *Bertholf v. O'Reilly*, 8 Hun. 16.

²⁰⁶ *Flower v. Witkovsky*, 69 Mich.

371, 37 N. W. Rep. 364.

²⁰⁷ *Fink v. Garman*, 40 Pa. St. 95;

Davies v. McKnight, (Pa. Sup.) 23 Atl.

Rep. 320.

the defendant, as that is the very foundation of the action. And to that end it must charge, with reasonable certainty, a sale or gift or furnishing of liquor by the defendant to the person intoxicated.²⁰⁸ But it is not necessary to allege the particular kind of liquor so sold or furnished.²⁰⁹ And where a sale to an intoxicated person is counted on, it is unnecessary to allege that the person making the sale knew of the intoxication of the purchaser, such knowledge being presumed from the very nature of the case.²¹⁰ In a single case it has been held that the complaint must aver that the liquor was not sold for medicinal or other legitimate purposes.²¹¹ But this cannot be a rule of general applicability, for if such fact could excuse the defendant at all, it is peculiarly a matter of defense, and not one to be negatived by the plaintiff in the first instance. It must further be alleged that the injuries counted on occurred in consequence of the person's intoxication. And it is considered that this requirement is not met by an averment that such person, "while in a state of intoxication, so that he was incapable of knowing what he was about or taking care of himself, fell into an open cellar," and was injured.²¹² In Nebraska, however, under the peculiar wording of the statute, it is held to be sufficient to allege the intoxication and negligence of the person to whom the defendant sold the liquor, and the injury to the plaintiff, without alleging that the injury resulted from the intoxication.²¹³ Where the action is brought by a wife, counting on an injury to her means of support, the declaration need only allege generally that plaintiff was injured in her means of support in consequence of her husband's intoxication; but thereunder plaintiff can prove only the extent of the injury to her means of support sustained

²⁰⁸ *Ford v. Ames*, 36 Hun, 571. A complaint which merely avers that defendant sold or gave, or permitted to be sold or given, to a third person named, a quantity of intoxicating liquor, which such person then and there drank, and by drinking which he became intoxicated, does not sufficiently show that defendant caused the intoxication, to render him liable. Under such averment, it may be that the liquor was given by some other person

than defendant. *Ditton v. Morgan*, 56 Ind. 60.

²⁰⁹ *Edwards v. Brown*, 67 Mo. 377; *Walser v. Kerrigan*, 56 Ind. 301.

²¹⁰ *Fletcher v. Forler*, 83 Mich. 52, 46 N. W. Rep. 1023. See, also, *Wright v. Treat*, 83 Mich. 110, 47 N. W. Rep. 243.

²¹¹ *Struble v. Nodwift*, 11 Ind. 64.

²¹² *Schwarm v. Osborn*, 59 Ind. 245.

²¹³ *Nowotny v. Blair*, (Nebr.) 49 N. W. Rep. 357.

as the necessary consequence of such intoxication, as that resulting from the husband's inability to labor while intoxicated. And where she wishes to prove that she has suffered damages in her means of support, which are the natural, but not the necessary, result of the husband's intoxication, it must be so alleged in the declaration.²¹⁴ An allegation that by reason of the liquor sold to plaintiff's husband by defendant, "he has become an habitual drunkard," is not irrelevant.²¹⁵ Exemplary damages are not the subject of a claim in such sense that it is necessary to make an averment thereof in the declaration; but such damages may always, in a proper case, be allowed by the jury without any such averment.²¹⁶

§ 320. Negating Contributory Negligence.

In an action under the civil damage laws, it is not necessary that the declaration or complaint should contain allegations negating contributory negligence on the part of the plaintiff. "This was not an action," says the supreme court of Indiana, "based upon the mere negligence or non-feasance of the defendant in failing to do that which the law required of him, or made it his duty to do, but upon an active, aggressive wrong, constituting the violation of a positive law, in knowingly selling intoxicating liquors to the plaintiff's husband while he was in a state of intoxication. Where one merely neglects a duty which the law imposes upon him, his act may be one of mere neglect or non-feasance, but when, in violation of a positive statute, he does an act to the injury of a third person, he thereby invades the rights of the other, and his act is one of active, aggressive wrong."²¹⁷

²¹⁴ Pegram v. Stortz, 31 W. Va. 220, 6 S. E. Rep. 485. A complaint alleging that defendant sold liquor to the husband, causing him to become intoxicated and incompetent to care for himself, and that while so intoxicated he remained away from home a number of days, obliging plaintiff to do his work, in which time he spent a large sum of

money needed for the support of plaintiff and family, sets forth a good cause of action. Hill v. Berry, 75 N. Y. 229.

²¹⁵ Roberts v. Taylor, 19 Nebr. 184, 27 N. W. Rep. 87.

²¹⁶ Gustafson v. Wind, 62 Iowa, 281, 17 N. W. Rep. 523.

²¹⁷ Beem v. Chestnut, 120 Ind. 390, 23 N. E. Rep. 303.

§ 321. Correspondence of Pleading and Proof.

As in all other actions, it is necessary that in suits brought under the civil damage laws there should be a correspondence between the *allegata* and the *probata*. But in some particulars the severity of this rule may be relaxed in consequence of the terms of the statute. For example, although the declaration, in an action by a wife against a liquor-seller for furnishing liquor to her husband, may allege that the husband's intoxication was caused wholly by the defendant, yet, where the statute gives a right of action against one who has caused such intoxication "in whole or in part," a recovery may be had when the proof shows only that it was caused in part by the defendant.²¹⁸ And so, in an action under these statutes, the allegation of a particular place of sale does not prevent the plaintiff from giving evidence of sales at other places.²¹⁹

§ 322. Amendment of Declaration.

In an action under the civil damage law, where the declaration alleges that by reason of defendant's sales of liquor, the plaintiff's husband became intoxicated and unable to attend to his business, and failed to support her, and that she was otherwise injured, it is proper to allow an amendment, by the insertion of an allegation that the husband, while drunk, assaulted and beat the plaintiff, as such amendment does not introduce a new cause of action.²²⁰ So also, it is held that the plaintiff should be allowed to amend the declaration by alleging defendant's knowledge of the intemperate habits of the person to whom the liquor was sold, when the question of the necessity of such an allegation is raised for the first time on the trial.²²¹

²¹⁸ Roth v. Eppy, 80 Ill. 283; Brannon

²²⁰ Chase v. Kenniston, 76 Me. 209.

v. Silvernail, 81 Ill. 434.

²²¹ Fletcher v. Forler, 83 Mich. 52, 46

²¹⁹ Gustafson v. Wind, 62 Iowa, 281, N. W. Rep. 1023.
17 N. W. Rep. 523.

PART VII. DAMAGES RECOVERABLE.

§ 323. Proper Elements of Damage.

The injuries for which damages may be recovered being enumerated in the statutes, it follows that the recovery must be limited to the classes of injury specified in the law or fairly within its terms. Thus, as we have already seen, the mental suffering of the plaintiff, disgrace, social ostracism, and the like, are not proper elements of the actual damages to be computed.²²² So also, this class of actions being brought for the loss of support, in case of the death of the inebriate husband, the cause of action does not include the loss of the society or companionship of the deceased. And hence, proof of a lack of affection, sympathy, or respect for him on the part of the widow is irrelevant and inadmissible.²²³ But on the other hand, the difference between the husband's actual earnings after the injury and the amount he would otherwise have earned, and the amount paid for medical attendance and for medicine, are proper elements of damage to be considered and allowed for.²²⁴

§ 324. Measure of Damages.

In some of the states,—as will appear from the synopsis of the statutes at the beginning of this chapter,—the amount to be recovered in a civil damage action is positively fixed at a certain sum. Here, of course, there is no occasion to seek a measure of damages beyond the statute. Recovery must be had of the precise statutory sum or not at all. In other states the limits of the recovery are fixed between certain amounts. And here, within the prescribed limits, the sum to be awarded as damages rests very much within the discretion of the jury. And it is held that, to assist them in determining the amount, evidence of the abusive habits of the intoxicated person, when drunk, is admissible, as also particular instances of his

²²² *Supra*, § 309.

²²⁴ *Thomas v. Dansby*, 74 Mich. 398,

²²³ *Kerkow v. Bauer*, 15 Nebr. 150, 18 41 N. W. Rep. 1088.
N. W. Rep. 27.

misconduct, though not connected by the evidence with sales made by the defendant.²²⁵

More usually, however, the statutes give a right of action for injuries to the plaintiff's person, property, or means of support, without fixing the amount of the recovery. Here the actual damages must be as nearly commensurate with the actual injury sustained as the case will permit. And the measure of damages must be fixed with reference to the actual situation, circumstances, and relations of the parties, and the real loss or injury proved, and not with reference to an abstract or ideal state of facts. Thus, in the wife's action, where the evidence shows that the husband had been intemperate, and the wife had supported herself and partly supported him ever since a time prior to the passage of the law, a charge to the jury which directed them in giving damages to estimate the loss of the sober, intelligent society of the husband, and the loss or want of means of support, is inappropriate; for while the defendants should be held liable for the injury they have actually inflicted, their liability must be measured by the effects produced upon the husband and wife as they were, and not as they might have been.²²⁶ Still it is important to remember that although the husband may be an habitual drunkard, and may in fact contribute nothing at all to the support of his family, yet the wife has at all times the right to rely upon his industry and his capacity to labor as her means of support.²²⁷ And it may well be that a dealer who furnishes liquor to such a person may inflict an actual injury upon the wife. For his sales may have encouraged, contributed to, or prolonged the intemperate habits which prevented the drunkard from earning money or obtaining employment. In other words, the fact of the idle and dissolute habits of the husband does not relieve the seller from responsibility. But it may justly affect the measure of damages. And for this reason evidence of the husband's age, habits, and circumstances in life, prior to the sales complained of, is competent.²²⁸ In the next place, the dam-

²²⁵ *Sackett v. Ruder*, (Mass.) 25 N. E. Rep. 736.

²²⁶ *Ganssly v. Perkins*, 30 Mich. 492.

²²⁷ *Supra*, § 308.

²²⁸ *Dunlavy v. Watson*, 38 Iowa, 398. See *McMahon v. Sankey*, (Ill. Sup.) 24 N. E. Rep. 1027.

ages, in an action of this character, are not to be commensurate with the amount of loss or injury to the *husband's* estate, but merely the diminution, if any, thereby resulting to the *wife's* means of present and future support.²²⁹ But in order to ascertain the amount of this diminution, evidence may be given of the amount of money withdrawn from the support of the wife, from week to week, and used in the purchase of liquor in defendant's saloon.²³⁰ The period for which damages are to be computed is the time during which the husband could furnish no support, or only a partial support, by reason of his intoxication or habitual drunkenness.²³¹ Where the action is brought by a father, who is compelled to support an indigent son, by reason of the intemperate habits of the latter caused or contributed to by the defendant, it is held that, as the father is under no legal obligation to furnish more than the necessary comforts of life to the son, the damages recoverable cannot exceed the cost of such support; and further, the recovery will be limited to the cost of support during the father's life-time.²³²

Where the loss of means of support complained of is attributable to the death of the intoxicated husband, the damages must be computed with reference to the expectation of life of the deceased. An instruction is erroneous which leads the jury into determining that the widow is entitled to damages for the loss of her husband's support during the expectancy of her life, without reference to the probabilities of the husband's life continuing as long as she might live.²³³ In a case where the evidence showed that the decedent had but partially supported his family, and was fifty-eight years of age at the time of his death, it was held that a verdict for \$2,500 was excessive and that the plaintiff should be required to remit \$500 thereof.²³⁴ But on the other hand, where the husband had been an industrious laboring man, engaged in working a farm on shares, and the plaintiff was

²²⁹ Mulford v. Clewell, 21 Ohio St. 191.

²³⁰ Hudson v. Weston, 23 Ill. App. 487. See, also, Hutchinson v. Hubbard, 21 Nebr. 33, 31 N. W. Rep. 245.

²³¹ Warrick v. Rounds, 17 Nebr. 411, 23 N. W. Rep. 785.

²³² Clinton v. Laning, 61 Mich. 355, 28 N. W. Rep. 125.

²³³ Brockway v. Patterson, 72 Mich. 122, 40 N. W. Rep. 192.

²³⁴ Curran v. Percival, 21 Nebr. 434, 32 N. W. Rep. 213.

left entirely destitute, with a young child to support, it was considered that a verdict for \$3,500 damages was not excessive.²³⁵ But evidence should not be admitted to show that since the death of the husband (a farmer) the widow had expended considerable sums in ditching, fencing, etc., for that is no criterion of what he, if alive, would have done.²³⁶ Under a statute which provides that the liquor-seller shall be liable "to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person," a recovery can be had only for the time during which such person may have remained intoxicated.²³⁷

§ 325. Exemplary Damages.

In some few of the states, the rule obtains that, in an action under the civil damage laws, only compensatory damages are to be recovered, and that exemplary damages can in no case be allowed.²³⁸ But for the most part the statutes, either expressly or by necessary implication, allow the recovery of punitive damages in proper circumstances. The act, in several jurisdictions, gives a right of action "for all damages sustained *and* for exemplary damages." And it has been thought that this required the jury, whenever they found actual damages, to add something thereto by way of exemplary damages, or at least authorized them to assess damages for the punishment of the defendant without proof of actual malice or other special circumstances of aggravation.²³⁹ But it can scarcely be maintained that the statute intended to give exemplary damages in all actions as of course. The better rule requires the court to instruct that such damages are punitive, as for a positive wrong or very gross neglect, and that the jury must exercise a sound discretion in determining them.²⁴⁰ It is clear also that in no case can exemplary damages be

²³⁵ Conklin v. Tice, (Sup.) 1 N. Y. Supp. 803.

²³⁶ Flynn v. Fogarty, 106 Ill. 263.

²³⁷ Krach v. Hellman, 53 Ind. 517.

²³⁸ Roose v. Perkins, 9 Nebr. 304, 2 N. W. Rep. 715, 31 Am. Rep. 409. See, also, Schafer v. Smith, 63 Ind. 226.

²³⁹ Thill v. Polman, 76 Iowa, 638, 41 N. W. Rep. 385; Schneider v. Hosier, 21 Ohio St. 98; Fox v. Wunderlich, 64 Iowa, 187, 20 N. W. Rep. 7.

²⁴⁰ Larzelere v. Kirchgessner, 73 Mich. 276, 41 N. W. Rep. 488. See, also, Goodenough v. McGrew, 44 Iowa, 670.

awarded without proof of a substantial injury of one of the kinds enumerated in the statute. Actual damages to person or property or means of support must be alleged and proved before the plaintiff can recover for exemplary damages, and without such actual damages the action cannot be sustained.²⁴¹

The rule, as stated by the supreme court of Michigan, is as follows: "The actual damages should be as nearly commensurate with the actual injury as the nature of the case will permit; and exemplary damages should be given in those cases, and only in those cases, where the plaintiff has some personal right to complain of a wanton and wilful wrong, which the wrong-doer, when he committed it, must be regarded as having committed against the plaintiff herself, in spite of the injury he must have known she was likely to suffer by it."²⁴² Or, as explained by the court in New York, exemplary damages cannot be awarded unless it be shown that the defendant acted from bad motives; as, for instance, where it is shown, in an action against one who sold the liquor, that he sold it in violation of law, or to one whom he knew to be far gone in the habit of intemperance, or who was already obviously under the influence of liquor, or who habitually squandered in dissipation the wages with which he should support his family; or where, in an action against the owner of the premises, it is shown that he leased them to a tenant knowing that he kept a disorderly place, or sold without a license or to minors or habitual drunkards.²⁴³ As a rule, therefore, exemplary damages should not be allowed, unless there are circumstances of abuse or aggravation proved, or unless the conduct of the defendant in furnishing the liquor was wilful, wanton, reckless, malicious, oppressive, or otherwise deserving of punishment, beyond what the requirements of mere compensation would impose.²⁴⁴ Thus, exemplary damages cannot

²⁴¹ *Gilmore v. Mathews*, 67 Me. 517; *Kellerman v. Arnold*, 71 Ill. 632; *Keedy v. Howe*, 72 Ill. 133; *Fentz v. Meadows*, Id. 540; *Albrecht v. Walker*, 73 Ill. 69; *Brantigan v. White*, Id. 561; *Confrey v. Stark*, Id. 187; *Graham v. Fulford*, Id. 596; *Schimmelfenig v. Donovan*, 13 Ill. App. 47.

²⁴² *Ganssly v. Perkins*, 30 Mich. 492.

²⁴³ *Rawlins v. Vidvard*, 34 Hun. 205.

²⁴⁴ *Kreiter v. Nichols*, 28 Mich. 496; *Jockers v. Borgman*, 29 Kans. 109, 44 Am. Rep. 625; *Larzelere v. Kirchgessner*, 73 Mich. 276, 283, 41 N. W. Rep. 488; *Peacock v. Oaks*, (Mich.) 48 N. W. Rep. 1082; *Franklin v. Schermerhorn*, 8 Hun. 112; *Kadgin v. Miller*, 18 Ill. App. 474; *Kellerman v. Arnold*, 71 Ill. 632.

be given to a wife where defendant has simply sold liquors illegally to her husband, whereby she is injured in her means of support, but only where the sale was made under such circumstances as showed malice, or a wanton and deliberate disregard of her known wishes and her rights.²⁴⁵ If the plaintiff has notified the defendant not to furnish liquor to the inebriate, a sale made in violation of the prohibition of the notice is considered as showing such a wilful disregard of plaintiff's just rights as to lay a foundation for exemplary damages.²⁴⁶ But the right to recover such damages is not limited to a case of furnishing liquor to an inebriate after notice not to do so, or to the case of preventing one endeavoring to reform from habits of intemperance from doing so, by tempting or inducing him to drink.²⁴⁷ Evidence that one knowing the husband to be in the habit of becoming intoxicated sold liquor to him while he was drunk, will support a verdict in favor of the wife for exemplary damages.²⁴⁸ So the wife may show, to sustain a claim for such damages, the number and ages of her children, if she also shows that the defendant, prior to selling the liquor to the husband, had knowledge that she had such children, and that they were in danger of being injured or compelled to leave home by reason of their father's dissolute habits; because, thereafter, the defendant's acts in selling would be wilful and wanton.²⁴⁹

In the state of New York, the rule appears to have been adopted that if the defendant's act in selling the liquor, or his course of business including the particular sale, was *illegal*,—as where he sells liquor without a license,—this of itself will be a ground for awarding exemplary damages in an action against him under the civil damage law.²⁵⁰ But this doctrine has not received general support. The question has been raised, however, whether the award of exemplary

²⁴⁵ Pegram v. Stortz, 31 W. Va. 220, 6 S. E. Rep. 485; Murphy v. Curran, 24 Ill. App. 475.

²⁴⁶ Rouse v. Melsheimer, 82 Mich. 172, 46 N. W. Rep. 372; Steele v. Thompson, 42 Mich. 594, 4 N. W. Rep. 536; McMahon v. Sankey, (Ill. Sup.) 24 N. E. Rep. 1027; McEvoy v. Humphrey, 77 Ill. 388. An award of \$400 as exemplary damages against a liquor-seller who sold to

plaintiff's husband while he was drunk, and after being notified not to sell to him, is not excessive. Jockers v. Borgman, 29 Kans. 109, 44 Am. Rep. 625.

²⁴⁷ Hackett v. Smelsley, 77 Ill. 109.

²⁴⁸ Weitz v. Ewen, 50 Iowa, 34.

²⁴⁹ Ward v. Thompson, 48 Iowa, 588.

²⁵⁰ Neu v. McKechnie, 95 N. Y. 632, 47 Am. Rep. 89; Davis v. Standish, 26 Hun, 608.

damages, in a case where the particular sale was made under such circumstances as to constitute it a criminal offense, would not conflict with the constitutional principle that no man should be twice punished for the same offense. On this point the authorities are not in harmony. But the better opinion appears to be that the constitutional rule does not apply, and that exemplary damages may be given in a proper case, notwithstanding the defendant has been or may be punished criminally for the same act of sale or gift.²⁵¹

The owner or lessor of the premises whereon the liquor-shop is situated, having knowledge of the traffic there carried on, is also liable, in many of the states, for exemplary damages as well as for the actual damages sustained. But in order to charge such a person with exemplary damages, a case must be made therefor against him individually. It is not enough that a case is made against the tenant which justifies the award of such damages against him. It must further be shown that the conduct of the lessor was wanton, wilful, or blameworthy, as where he suffered the tenant to continue in possession although he knew the latter was keeping his place in such a manner as to constitute it a nuisance, or was selling without a license or to persons to whom he was forbidden to sell.²⁵²

The allowance of exemplary damages, in these actions, rests very much within the discretion of the jury. And it is not within the province of the court to instruct them that any particular fact entitles the plaintiff to such damages.²⁵³ But it is not error to refuse to exclude such damages from the consideration of the jury, when there is some evidence tending to show that sales had been made against the wife's remonstrances.²⁵⁴ And it is proper to instruct the jury that they may, if they find for the plaintiff, assess her damages at such sum as they think from the evidence she ought to recover,

²⁵¹ *Jockers v. Borgman*, 29 Kans. 109, 44 Am. Rep. 625; *Braunon v. Silvernail*, 81 Ill. 434; *Roberts v. Mason*, 10 Ohio St. 277; *Cook v. Ellis*, 6 Hill, (N. Y.) 466. Compare *Koerner v. Oberly*, 56 Ind. 284, 26 Am. Rep. 34; *Albrecht v. Walker*, 73 Ill. 69; *Murphy v. Hobbes*, 7 Colo. 541, 5 Pac. Rep. 119, 49 Am. Rep. 366.

²⁵² *Reid v. Terwilliger*, 116 N. Y. 530, 22 N. E. Rep. 1091; *Ketcham v. Fox*, 52 Hun. 284, 5 N. Y. Supp. 272; *Rawlins v. Vidvard*, 34 Hun. 205.

²⁵³ *Goodenough v. McGrew*, 44 Iowa, 670.

²⁵⁴ *Gaussly v. Perkins*, 30 Mich. 492.

not exceeding the *ad damnum*, where the evidence shows sales made to the husband while drunk.²⁵⁵ Sales made by the defendant after the commencement of the action may be proved, and considered by the jury on the question of exemplary damages.²⁵⁶ Nor will the verdict, awarding exemplary damages, be set aside on the ground that the damages are excessive, unless the court is satisfied that the jury abused its discretion.²⁵⁷

On the part of the defendant, for the purpose of avoiding or reducing exemplary damages, evidence may be given of his honest endeavors to prevent injury to the plaintiff and of his having been deceived or misled by tricks and artifices. Thus, he may show that he endeavored to prevent the plaintiff's husband from getting liquor at his place, that he frequently refused him liquor, and instructed his clerk to refuse him, but that the husband procured it through others, concealing his name.²⁵⁸

§ 326. Reduction or Mitigation of Damages.

In an action to recover damages for injuries caused by the sale of intoxicating liquors to plaintiff's husband, to render evidence of recoveries from other parties admissible to reduce the damages, it must be shown that such other recoveries were for sales during the same time as that covered by the alleged sales by defendant.²⁵⁹ Evidence that the intoxicated party had procured liquors at other places besides the defendant's, which contributed to his intoxication, may be received in mitigation of the damages.²⁶⁰

PART VIII. EVIDENCE IN CIVIL DAMAGE ACTIONS.

§ 327. Admissibility of Evidence in General.

In an action by a wife to recover damages for injuries caused by the sale of liquor to her husband, evidence as to the number, age, and

²⁵⁵ Kennedy v. Sullivan, (Ill. Sup.) 26 N. E. Rep. 382.

²⁵⁶ Bean v. Green, 33 Ohio St. 444.

²⁵⁷ Schneider v. Hosier, 21 Ohio St. 93.

²⁵⁸ Bates v. Davis, 76 Ill. 222.

²⁵⁹ Jackson v. Noble, 54 Iowa, 641, 7 N. W. Rep. 88. See, also, Ennis v. Shiley, 47 Iowa, 552.

²⁶⁰ Hemmens v. Bentley, 32 Mich. 83.

sex of her children is not admissible; for since the plaintiff can recover only for her own proper loss or damage, and the statute gives a separate right of action to each of the children, such testimony could have no relevancy and might improperly enhance the damages awarded.²⁶¹ Where injury to the means of support is counted on, a judgment obtained by the plaintiff in an action against another party, for injury thereto accruing at the same period, is admissible to show the actual extent of the wrong done by defendant.²⁶² And where the death of the husband is relied on as a cause of action, evidence tending to show that his death was the result of frequent intoxication caused by liquor sold to him by the defendant is admissible.²⁶³ So where plaintiff's husband came to his death through the act of an intoxicated person, evidence of the habits of the husband as a drinking man is proper to be received as bearing on the question of damages.²⁶⁴ But evidence of the value of the estate of the husband before the liquor law took effect, and the reduced condition of his pecuniary affairs at the time of the trial, is not admissible.²⁶⁵ Evidence of his having been an habitual drunkard for many years, is not competent to reduce the damages, but is admissible to show defendant's sales to have been unlawful.²⁶⁶ The defendant's license to sell intoxicating liquor is not admissible in evidence on the defense, since it affords him no protection against a proceeding under the civil damage statute.²⁶⁷ But where the action is upon the liquor-dealer's bond, the village record or minute-book of the trustees, showing the proceedings of the board in relation to granting liquor-licenses and the approval of the bonds of dealers, is admissible in evidence.²⁶⁸

²⁶¹ *Huggins v. Kavanagh*, 52 Iowa, 368, 3 N. W. Rep. 409; *Welch v. Jugenheimer*, 56 Iowa, 11, 8 N. W. Rep. 673; *Thomas v. Dansby*, 74 Mich. 398, 41 N. W. Rep. 1088; *Larzelere v. Kirchgessner*, 73 Mich. 276, 41 N. W. Rep. 488; *Johnson v. Schultz*, 74 Mich. 75, 41 N. W. Rep. 865.

²⁶² *Engleken v. Webber*, 47 Iowa, 558.

²⁶³ *Squires v. Young*, 58 N. H. 192.

²⁶⁴ *Brockway v. Patterson*, 72 Mich. 122, 40 N. W. Rep. 192.

²⁶⁵ *McCann v. Roach*, 81 Ill. 213.

²⁶⁶ *Huff v. Aultman*, 69 Iowa, 71, 28 N. W. Rep. 440.

²⁶⁷ *Roth v. Eppy*, 80 Ill. 283.

²⁶⁸ *Scott v. Chope*, (Nebr.) 49 N. W. Rep. 940.

§ 328. Competency of Husband as Witness.

In a wife's action under the civil damage law, her husband is a competent witness in her behalf.²⁶⁹ But declarations of the husband as to where he procured the liquor, or how he received the injuries complained of, are not admissible on the ground of privity between husband and wife, as the wife's right of action does not come to her by succession from the husband, but is a creation of the statute.²⁷⁰ And where the plaintiff has not called her husband as a witness, evidence of statements made by him is inadmissible against her.²⁷¹

§ 329. Evidence of Antecedent Facts.

In actions of this character, as a general rule, evidence of facts antecedent to the unlawful acts complained of cannot be received, except to show the habits and circumstances of the husband before those acts were committed. But evidence of his pecuniary condition before the acts complained of may be introduced, not as showing a substantive cause of action, but to be considered with other facts as showing the damages sustained by the plaintiff.²⁷² When the defendant introduces evidence to show that the husband had been a confirmed drunkard for many years before defendant sold him liquor, evidence of sales made by him two years prior to the action is admissible in rebuttal.²⁷³ And so, evidence that the defendant had been several times convicted of selling liquor without a license, both before and since the cause of action arose, is admissible for the purpose of affecting the weight of his testimony.²⁷⁴

§ 330. Evidence Confined to Injury Alleged.

Inasmuch as the civil damage laws enumerate several distinct species of injury, each of which may constitute a cause of action by

²⁶⁹ Davenport v. Ryan, 81 Ill. 218.

²⁷⁰ Richards v. Moore, (Vt.) 19 Atl. Rep. 390; Brockway v. Patterson, 72 Mich. 122, 40 N. W. Rep. 192.

²⁷¹ Judge v. Jordan, (Iowa,) 46 N. W. Rep. 1077.

²⁷² Friend v. Dunks, 37 Mich. 25; Du-bois v. Miller, 5 Hun, 332.

²⁷³ Gustafson v. Wind, 62 Iowa, 281, 17 N. W. Rep. 523.

²⁷⁴ Morenus v. Crawford, 51 Hun, 89, 5 N. Y. Supp. 453.

itself, the rule applies that the plaintiff's evidence cannot be allowed to take a wider range than is indicated by the statement of the cause of action. Where, for example, the alleged injury is to the plaintiff's means of support, proof that the plaintiff was injured in person by her husband, while he was intoxicated, is not admissible; the evidence should be confined to the injury alleged; and error in admitting such evidence will not be cured by instructions to the jury to award no damages on account of such personal injuries.²⁷⁵

§ 331. Proof of Character of Plaintiff.

In all cases where the right of action depends upon the relationship of the plaintiff to the intoxicated person, as where the suit is brought by a husband, wife, son, or daughter, it is an essential part of the plaintiff's case to show the existence of such relationship. So under a statute (in Vermont) giving a right of action for injuries caused by the sale of liquor to any "person who is in any manner dependent on such injured person," it is necessary, in an action by one claiming to be a widow, that she should prove her lawful marriage to the decedent. And if a child brings the action, he must prove that he was legitimate. The dependence spoken of in the statute is a legal dependence.²⁷⁶

§ 332. Proof of Sale by Defendant.

As the gist of an action under the civil damage laws is the sale or furnishing of liquor by the defendant, the burden of proving this principal fact rests upon the plaintiff.²⁷⁷ It may be established inferentially from facts sworn to by witnesses. Thus, testimony that a man at the bar of a saloon was furnished with a glass containing liquor that looked like beer, that he paid for it, and that he was presently much intoxicated, tends to show that intoxicating liquor had been sold to him.²⁷⁸ So, where defendant is town agent for selling liquor pur-

²⁷⁵ Hackett v. Smelsley, 77 Ill. 109.

²⁷⁶ Good v. Towns, 56 Vt. 410, 48 Am. Rep. 799.

²⁷⁷ Jones v. Bates, 26 Nebr. 693, 42 N. W. Rep. 751.

²⁷⁸ Wilson v. Booth, 57 Mich. 249, 23 N. W. Rep. 799. See, also, Astheimer v. O'Pray, (Sup.) 16 N. Y. Supp. 470.

suant to statute, and as such agent keeps a book of entries of his sales, the book is competent evidence for the plaintiff to show the number and amount of sales to the person who killed her husband, as tending to fix knowledge on the defendant that such person wanted the liquor for illegal purposes.²⁷⁹ But proof that the husband, who kept one of defendant's bars, got drunk on liquor which he took from the bar, and that defendant knew that he was drinking but said nothing about it, does not establish a giving of liquor by defendant.²⁸⁰ Proof of the sale of liquor by circumstantial evidence may be so strong as to justify the jury in disregarding the positive assertion of the bartender that the liquor sold by him was not intoxicating.²⁸¹ It may be presumed that a person seen to enter a liquor-saloon sober and to emerge therefrom drunk, bought or procured liquor there.²⁸² But the plaintiff cannot recover merely upon proof that defendant was a liquor-seller, that her husband had been in his store, and had been seen coming therefrom intoxicated.²⁸³ Where the evidence showed that defendant's saloon was open at night, while a fire was raging near by; that plaintiff's husband was assisting the firemen in removing property from the burning building into the saloon; that defendant, at the request of the owner of said building, furnished liquor to the firemen; and that plaintiff's husband was found dead drunk that night; it was held that this justified a verdict for the plaintiff.²⁸⁴ Where a witness testifies that deceased had taken a drink in defendant's saloon, the further testimony of such witness that, when deceased came to another saloon, "he wanted to take *another* drink," is not objectionable as containing a corroborating statement of deceased that he had already taken one drink.²⁸⁵ If the plaintiff's husband was accustomed to deal with defendant, the jury may infer that the liquor he obtained was sold, not given, although it was neither paid for nor charged.²⁸⁶ The defendant may of course introduce evidence

²⁷⁹ Stanton v. Simpson, 48 Vt. 628.

²⁸⁰ Campbell v. Schlesinger, (Sup.) 1 N. Y. Supp. 220.

²⁸¹ Curran v. Percival, 21 Nebr. 434, 32 N. W. Rep. 213.

²⁸² Curran v. Percival, 21 Nebr. 434, 32 N. W. Rep. 213.

²⁸³ Lovelan v. Briggs, 32 Hun, 477.

²⁸⁴ Judge v. Jordan, (Iowa,) 46 N. W. Rep. 1077.

²⁸⁵ Mayers v. Smith, 121 Ill. 442, 13 N. E. Rep. 216.

²⁸⁶ Rafferty v. Buckman, 46 Iowa, 195.

to negative the allegation of sales by him. But testimony that defendant had refused to furnish liquor to the party, without disproving the particular acts testified to by witnesses for the plaintiff, will not warrant a verdict for defendant.²⁸⁷ Where there is no evidence connecting a third person with an actual sale of liquor to the husband on the day in question, evidence that the third person was reputed to be engaged in the illegal sale of liquor is inadmissible to show that defendant did not furnish the husband with liquor, although there is evidence that the husband stopped at the third person's place, and that he was seen to hand something to the husband.²⁸⁸

§ 333. Proof of Intoxication as Cause of Injury.

It is further necessary for the plaintiff to prove that the defendant's sale of liquor produced intoxication. In this connection, it has been held correct to instruct the jury that "whenever a man is under the influence of liquor so as not to be entirely at himself, he is intoxicated, though he can walk straight, though he can attend to his business, and may not give any outward and visible signs to the casual observer that he is drunk."²⁸⁹ But the jury must be satisfied, by a preponderance of evidence, that defendant contributed to the intoxication of the party in an appreciable degree.²⁹⁰ Where it is undisputed that the party drank one glass of whisky in defendant's saloon, and three witnesses testify that very soon after he was so drunk that he staggered, though several witnesses testify that he was not then intoxicated, the question whether his intoxication was caused wholly or partly by the liquor furnished by defendant is for the jury.²⁹¹ Proof that the party bought liquor of the defendant will not shift the burden upon the latter to show that his liquor did not cause the former's intoxication.²⁹² It is also incumbent upon the plaintiff to prove that the intoxicated person sustained the injuries in question in con-

²⁸⁷ *McManigal v. Seaton*, 23 Nebr. 549, 37 N. W. Rep. 271.

²⁸⁸ *Richards v. Moore*, (Vt.) 19 Atl. Rep. 390.

²⁸⁹ *Elkin v. Buschner*, (Pa. Sup.) 16 Atl. Rep. 102.

²⁹⁰ *Chase v. Kenniston*, 76 Me. 209;

Blatz v. Rohrbach, (Sup.) 14 N. Y. Supp. 458.

²⁹¹ *McCarty v. Wells*, 51 Hun, 171, 4 N. Y. Supp. 672.

²⁹² *Macleod v. Geyer*, 53 Iowa, 615, 6 N. W. Rep. 21.

sequence of the alleged intoxication.²⁹³ In a case where there was evidence that the deceased drank at various places and became so much intoxicated as to be unable to walk, and the witnesses did not see him again until his body was found in a mill-race, in water two and one-half to four feet deep, in which he had been drowned, it was held that there was sufficient evidence to sustain a finding that his death was caused by intoxication.²⁹⁴ So, where plaintiff's husband was killed in a fight with a person who was drunk on liquor furnished by defendant, evidence that the husband was quiet when sober, and quarrelsome when drunk, is admissible as bearing on the question whether he was intoxicated at the time of the injury, and whether his intoxication contributed to the injury.²⁹⁵ In a recent case in Nebraska, the action was for loss of means of support in consequence of the suicide of plaintiff's husband, caused, as it was alleged, by continued intoxication from liquor furnished by the defendants for several days before his death. There was proof tending to show that for several days the deceased had been sober, and that the act had been deliberately done. There was also proof tending to show that for a considerable period prior to his death he had been constantly under the influence of liquor furnished by defendants. It was held that physicians were properly allowed to answer hypothetical questions as to the probable effect of the continued use of intoxicating drinks in causing suicide.²⁹⁶

§ 334. Evidence of Decedent's Expectation of Life.

Where the injury to the plaintiff's means of support which forms the cause of action results from the death of her husband, and he is shown to have been a strong and healthy man, annuity tables—such as the Carlisle or the Northampton tables—may be resorted to for the purpose of determining what would have been the probable duration of his life, and thus aiding in estimating the damages.²⁹⁷

²⁹³ *Murphy v. Curran*, 24 Ill. App. 475.

²⁹⁴ *McCarty v. Wells*, 51 Hun, 171, 4 N. Y. Supp. 672.

²⁹⁵ *Brockway v. Patterson*, 72 Mich. 122, 40 N. W. Rep. 192.

²⁹⁶ *Poffinbarger v. Smith*, 27 Nebr.

788, 43 N. W. Rep. 1150. But evidence that, on the day of the suicide, decedent was charged with embezzlement, was properly excluded. *Id.*

²⁹⁷ *Roose v. Perkins*, 9 Nebr. 304, 2 N. W. Rep. 715, 31 Am. Rep. 409; *King v.*

But if the person is not shown to have been robust and strong, the jury, in estimating his probabilities of life, must not regard the standard applied to more sound and healthy lives, but base their calculation upon his own condition and prospects.²⁹⁸

§ 335. Evidence to Charge Lessor of Premises.

Under the statutory provisions imposing a liability on the lessor of premises, knowing and consenting to their use as a liquor shop, it is necessary, as we have already stated, to make a case individually against the lessor, and proper evidence of his knowledge and consent must be given. In a case where it was shown that defendant, before leasing his building, stated that his prospective tenant intended to keep a hotel, and could get a license; that he was several times about the hotel while it was being fitted up, and was in the habit of going there two or three times a week; together with evidence that there was a regular bar-room in the hotel, where every one got liquor who asked for it; this was held sufficient proof of a leasing for the purpose of the sale of liquors, and of knowledge that the premises were used for that purpose.²⁹⁹ But proof that the lessee's bar-tender gave liquors to the plaintiff's husband does not show a giving away by the lessee so as to render the owner of the premises liable, such gift by the bar-tender being beyond the scope of his authority.³⁰⁰ And evidence of a conversation concerning the sale of liquor to plaintiff's husband, between plaintiff and the lessee's husband, five years before trial, and before the lease, and not at the leased premises, is incompetent.³⁰¹ Where the action is to enforce on the premises the lien of a judgment recovered against the tenant, such judgment is evidence of the fact of its own rendition, but it is not evidence of the amount for which the property is to be sub-

Bell, 13 Nebr. 409, 14 N. W. Rep. 141;
 Sellars v. Foster, 27 Nebr. 118, 42 N. W.
 Rep. 907; Davis v. Standish, 26 Hun. 608;
 Hall v. Germain, (Sup.) 14 N. Y. Supp. 5.
²⁹⁸ Clinton v. Lauing, 61 Mich. 355, 28
 N. W. Rep. 125.

²⁹⁹ Conklin v. Tice, (Sup.) 1 N. Y.
 Supp. 803.

³⁰⁰ Campbell v. Schlesinger, (Sup.) 1
 N. Y. Supp. 220.

³⁰¹ Ketcham v. Fox, 52 Hun, 284, 5 N.
 Y. Supp. 272.

jected, as against the owner who was not a party to the original proceedings.³⁰²

§ 336. Evidence on Question of Exemplary Damages.

If the plaintiff, in an action of this character, claims exemplary damages, it is incumbent on him to prove affirmatively such facts and circumstances as will show the defendant's conduct to have been malicious, wanton, or oppressive; as, that defendant knew the intemperate habits of the party to whom he sold liquor, that he had been notified not to sell to such party, or the like.³⁰³ Evidence that plaintiff had requested defendant not to sell liquor to her husband is competent, although, at the time of the request, defendant was not licensed to sell liquor.³⁰⁴ And the reading by the judge to the jury of the statute prohibiting the sale of liquor to an intoxicated person or an habitual drunkard is not error, as it is admissible on the question of exemplary damages.³⁰⁵ To meet a claim for such damages, defendant must be allowed to introduce evidence of his good faith, of the absence of bad motives on his part, and of his endeavors to prevent the accruing of injury to the plaintiff. But where there is nothing to show that the jury gave the plaintiff exemplary damages, the exclusion of evidence offered by defendant to show that he had instructed his bar-tender not to sell liquor to plaintiff's husband is not error.³⁰⁶

§ 337. Weight and Sufficiency of Evidence.

The action authorized by the civil damage laws is penal in its nature, but it is not a criminal proceeding. Hence, while the material allegations of the declaration must be fully proved, it is not necessary that the evidence should exclude all reasonable doubt. A preponderance of evidence is sufficient, and this may result from cir-

³⁰² Buckham v. Grape, 65 Iowa, 535, 17 N. W. Rep. 755.

³⁰³ Larzelere v. Kirchgessner, 73 Mich. 276, 41 N. W. Rep. 488.

³⁰⁴ Larzelere v. Kirchgessner, 73 Mich. 276, 41 N. W. Rep. 488.

³⁰⁵ Johnson v. Schultz, 74 Mich. 75, 41 N. W. Rep. 865.

³⁰⁶ Mayers v. Smith, 121 Ill. 442, 13 N. E. Rep. 216.

cumstantial as well as direct evidence.³⁰⁷ Where, for example, it is shown that defendant kept a liquor-store; that he knew plaintiff's husband to be a regular drunkard; and plaintiff testifies that she saw her husband drinking liquor in defendant's place with persons named; that he was "beastly drunk" and brought home helpless; that she requested defendant not to sell to him, which he continued to do; and that the husband beat her and failed to support her; this makes out a case sufficient to require a submission to the jury, although defendant denies each charge, as the jurors are not bound to believe him.³⁰⁸ So, where a statute provides that "whoever shall sell or give intoxicating liquor to any minor shall forfeit \$100 for each offense, to be recovered by the parent or guardian of such minor in an action of tort," the action under the statute is a civil proceeding, and the defendant's guilt need not be proved beyond a reasonable doubt; it need not be proved that he knew the buyer to be a minor.³⁰⁹

³⁰⁷ Hall v. Barnes, 82 Ill. 228; Lyon v. Fleahmann, 34 Ohio St. 151.

³⁰⁸ O'Connor v. Couzen, 102 N. Y. 702, 7 N. E. Rep. 369.

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³⁰⁹ Roberge v. Burnham, 124 Mass. 277, construing Pub. St. Mass. c. 100, § 24. Compare Comm. v. Finnegan, 124 Mass. 324.

CHAPTER XIV.

INJUNCTION AND ABATEMENT OF LIQUOR NUISANCES.

- § 338. Statutes Defining Liquor Nuisances.
- 339. Constitutionality of Statutes.
- 340. Elements of the Offense.
- 341. Who may Institute Proceedings.
- 342. Parties Defendant.
- 343. Abatement of Nuisance.
- 344. Injunction against Nuisance.
- 345. Pleading.
- 346. Evidence.
- 347. Practice.
- 348. Allowance of Attorney's Fees.
- 349. Contempt Proceedings for Violation of Injunction.

§ 338. Statutes Defining Liquor Nuisances.

In several states, statutes have been enacted declaring that houses or tenements kept for the unlawful sale of intoxicating liquors shall be deemed public nuisances; allowing any citizen of the county to maintain a bill for an injunction, or authorizing the district attorney to file an information; giving jurisdiction to chancery to enjoin the nuisance; and in some cases authorizing its abatement by the removal and sale (or destruction) of the liquors, vessels, and implements of the trade, and the closing up of the building.¹ It is at least doubtful whether, in the absence of such statutes, equity would take jurisdiction of an application by a private person for an injunction against an unlicensed liquor-shop, though the keeping of it might constitute a public nuisance, unless the petitioner could show some special and individual damage sustained by him in consequence of it.² And even under legislative enactments of this character, the effect is not to make intoxicating liquors in themselves a common

¹ Rev. St. Me. c. 27; Rev. St. Vt. § 3834; McClain's Code, Iowa, 1888, §§ 1543, 2389; Comp. Laws Kans. § 2299; Laws St. Mass. 1887, c. 380, § 1; Ohio Act May 1, 1854, § 4, (S. & C. 1431;) Code W. Kans. 1887, p. 233.
Va. c. 32, § 18; Laws N. H. 1887, c. 77, §§ 1, 2; Laws R. I. 1887, c. 634, § 14;

² See State v. Uhrig, 14 Mo. App. 413.

nuisance, in any such sense that a building in which they were kept might lawfully be broken open, and the liquors destroyed, as a nuisance, by persons whose relations and friends frequented the building and obtained liquor there.³

§ 339. Constitutionality of Statutes.

The constitutional validity of statutes such as are described in the preceding section has not been successfully questioned. On the contrary, they are sustained as proper and legitimate exertions of the police power, and are not regarded as violative of any rights guaranteed by the constitutions.⁴ In particular, it cannot be maintained that such a law is in contravention of the constitutional guaranty of trial by jury, inasmuch as equity possesses an ancient and well-settled jurisdiction for the abatement of nuisances.⁵ Neither is it unconstitutional as depriving the guilty person of his property without due process of law, the proper and orderly proceedings of a court of chancery being "due process of law" within the meaning of the constitutional guaranty.⁶ Nor is it invalid as authorizing punishment of the offender by fine and imprisonment without indictment by a grand jury, the imposition of such punishment, as provided by the statute, being in the exercise of the chancellor's power to punish for contempt when the defendant refuses to obey the mandate for the abatement of the nuisance, and it being within the province of a court of competent jurisdiction to punish for contempt, whether the proceedings therefor be regarded as civil or criminal, without an

³ *Brown v. Perkins*, 12 Gray, 89.

⁴ *Comm. v. Howe*, 13 Gray, 26; *State v. Hughes*, 16 R. I. 403, 16 Atl. Rep. 911; *Streeter v. People*, 69 Ill. 595; *Our House v. State*, 4 Greene, (Iowa,) 172; *Zumhoff v. State*, Id. 526.

⁵ *Littleton v. Fritz*, 65 Iowa, 488, 22 N. W. Rep. 641, 54 Am. Rep. 19; *State v. Jordan*, 72 Iowa, 377, 34 N. W. Rep. 285; *Carleton v. Rugg*, 149 Mass. 550, 22 N. E. Rep. 55; *Schmidt v. Cobb*, 119 U. S. 286, 7 Sup. Ct. Rep. 1873. In *New Hampshire*, however, defendant is entitled to a trial by jury to ascertain the

fact of the nuisance before it can be abated in equity; on the ground that it is there the uniform practice of equity to withhold the permanent injunction against an alleged nuisance, until the fact of its existence has been established by the verdict of a jury, if the defendant demands a jury trial. *State v. Currier*, (N. H.) 19 Atl. Rep. 1000.

⁶ *State v. Jordan*, 72 Iowa, 377, 34 N. W. Rep. 285; *Craig v. Werthmueller*, 78 Iowa, 598, 43 N. W. Rep. 606; *McLane v. Leicht*, 69 Iowa, 401, 29 N. W. Rep. 327.

indictment.⁷ Further, if the corporate powers conferred upon a municipality are broad enough to authorize an ordinance declaring the selling of spirituous liquors a nuisance, such ordinance is valid.⁸ But an ordinance declaring that all intoxicating liquors kept within the limits of the town for the purpose of being sold for consumption within the town shall be deemed a nuisance, and directing the police officers of the town to abate the nuisance, by removing the liquor beyond the town limits, cannot authorize such officers to seize and carry away property, without first having the question judicially determined whether such ordinance had been violated. A man's property cannot be seized except for a violation of law, and whether he has been guilty of such violation can only be determined by a court of competent jurisdiction.⁹

§ 340. Elements of the Offense.

In order to constitute a place kept for the sale of liquor a nuisance, under the terms of the statutes we are considering, it is not necessary that such place should be kept in a disorderly manner,¹⁰ nor that the proprietor should permit the drinking of liquor on the premises.¹¹ Nor, to convict a defendant of maintaining the nuisance, is it necessary to show that he knew that the liquor sold at his place was intoxicating.¹² In Iowa, it is held that the statute applies not only to such places as are used for retailing intoxicating liquors, but also to all places used for the unlawful manufacture, sale, or keeping for sale, of such liquors.¹³ And in Massachusetts, where the law provides that "all buildings, places, or tenements . . . used for the illegal keeping or sale of intoxicating liquor shall be deemed common nuisances," it is held that an hotel may be a "place" within the meaning of the statute.¹⁴ As regards the owner of leased prem-

⁷ State v. Jordan, 72 Iowa, 377, 34 N. W. Rep. 285.

⁸ Goddard v. Jacksonville, 15 Ill. 588, 60 Am. Dec. 773.

⁹ Darst v. People, 51 Ill. 286.

¹⁰ Howard v. State, 6 Ind. 444.

¹¹ State v. Fraser, (N. Dak.) 48 N. W. Rep. 343.

¹² State v. Hughes, 16 R. I. 403, 16 Atl. Rep. 911.

¹³ Craig v. Werthmueller, 78 Iowa, 598, 43 N. W. Rep. 606.

¹⁴ Comm. v. Purcell, (Mass.) 28 N. E. Rep. 288.

ises, it is held that mere knowledge on his part that they are used for liquor-selling will not expose him to punishment for maintaining a nuisance; there must be proof of his permission or consent.¹⁵ In West Virginia, under the terms of the statute, it is held that a court of equity cannot restrain by injunction a party charged with selling intoxicating liquors contrary to law, or abate the house or building where such liquors are alleged to be sold, until the owner or keeper of such house or place has been convicted of such unlawful selling at the place named in the bill.¹⁶ But such previous conviction of the offender does not appear to be considered requisite to the exercise of the powers of equity in the other states.

§ 341. Who may Institute Proceedings.

The laws on the subject of liquor nuisances commonly provide that the proceedings for their abatement may be instituted by "any citizen of the county" wherein the nuisance exists or is kept or maintained. Under this clause some decisions have been made which are important to be here noticed. Thus, it is held that the action may be prosecuted by a person having the necessary qualification of residence, both as a citizen of the county and as attorney for the state.¹⁷ And the right to prosecute such action to judgment is not lost by the plaintiff's removal from the county after the commencement of the action.¹⁸ For if the plaintiff's qualification of citizenship is regarded as essential to the jurisdiction, it is a rule that jurisdiction, having once attached, is not divested by the subsequent loss of that qualification. It is also held that a Methodist clergyman, appointed to preach in a particular town for a year, and intending to reside there as long as permitted by the church authorities, and no longer, is a citizen, within the meaning of the statute.¹⁹ Where another statute of the state provides that any person who has an interest in the matter in litigation, in the success of either of the par-

¹⁵ State v. Stafford, 67 Me. 125.

¹⁸ Judge v. Kahl, 74 Iowa, 486, 38 N.

¹⁶ Hartley v. Henretta, (W. Va.) 13 S. E. Rep. 375.

W. Rep. 173.

¹⁷ State v. Sioux Falls Brewing Co., (S. Dak.) 50 N. W. Rep. 629.

¹⁹ Fuller v. McDonnell, 75 Iowa, 220, 39 N. W. Rep. 277.

ties, or against both, may become a party by intervention, it is held that this does not confer on a citizen the right to intervene in a suit commenced by another citizen for the abatement of a liquor nuisance.²⁰ In such action, an answer denying knowledge or information sufficient to form a belief as to whether plaintiff is a citizen of the county, is equivalent merely to a general denial, and therefore raises no issue as to plaintiff's residence or citizenship.²¹

§ 342. Parties Defendant.

A person who holds a license or permit to sell liquor for certain purposes, but who sells for other and unlawful purposes, or who sells for the permitted purposes without observing the conditions or formalities which the law imposes upon him, is guilty of maintaining a nuisance and may be enjoined.²² Where it appears that two persons, as partners, are owners of the nuisance, only one of whom is made a party, the other must be brought into court before a final decree can be made.²³ It is further to be observed that the "keeper" of such a place is not only the owner thereof, but any other person who is in possession and control of the room and liquors, and who manages the unlawful business.²⁴ At the same time, if one defendant is the sole proprietor, or has sole charge of the premises, and the other only kept or maintained the premises as his servant, under his direct personal supervision, the latter cannot be convicted.²⁵ If the owner or lessor of the property, though taking no direct part in the unlawful business, knows of the use which is being made of the property and consents thereto, he is guilty of the nuisance, equally with the saloon-keeper.²⁶ Where the defendants hold the building in question under a life-estate, a decree closing such building for a year will become inoperative at the termination of such estate, if it

²⁰ Fennell v. Zerber, 74 Iowa, 699, 39 N. W. Rep. 113.

²¹ Craig v. Hasselman, 74 Iowa, 538, 38 N. W. Rep. 402.

²² State v. Webber, 76 Iowa, 686, 39 N. W. Rep. 286; State v. Davis, 44 Kans. 60, 24 Pac. Rep. 73.

²³ Shear v. Green, 73 Iowa, 688, 36 N. W. Rep. 642.

²⁴ Schultz v. State, 32 Ohio St. 276.

²⁵ State v. Gravelin, 16 R. I. 407, 16 Atl. Rep. 914.

²⁶ Bell v. Glaseker, (Iowa,) 47 N. W. Rep. 1042; State v. Douglass, 75 Iowa, 432, 39 N. W. Rep. 686.

terminate within the year, the remainder-men not being made parties to the action.²⁷ The jurisdiction of all matters in bankruptcy vested in the federal courts is not exclusive of that of the state courts to entertain an action for the abatement of a liquor nuisance maintained on property belonging to the bankrupt estate, that being a matter of police regulation, which does not interfere with the bankrupt jurisdiction of the federal courts.²⁸

§ 343. Abatement of Nuisance.

The statutes provide for the abatement of an existing nuisance by seizing and destroying the liquor, removing from the building all articles used in carrying on the business, and closing the place for a definite period, as a year. When the fact of the nuisance has been established, an order for its abatement in this manner is not only justified, but it is error for the court to refuse to make it.²⁹ But the statute does not authorize the destruction of the building by private individuals or by the public authorities; the abatement of a nuisance, caused by the illegal use of a building, consists in the prevention of the future illegal use, and not in the destruction of the building; and no private individual is authorized to abate a nuisance, public or private, except when and so far as it actually obstructs him in the exercise of his rights.³⁰ And further, "no order to shut up or abate the place can rightfully be made, unless the nuisance continues to exist at the time such order is made. Unless, therefore, the court is satisfied that, at the time of making the order, the place is kept for the sale of liquors in violation of the act, no order should be made. For it is the unlawful business, and not the place *per se*, that creates the nuisance; and hence, when the business has ceased, there is no nuisance to abate. No man's property can be forfeited as a punishment for crime. . . . Hence there is no power to deprive a man of the use of his property, unless it be necessary in order to abate an

²⁷ Danner v. Hotz, 74 Iowa, 389, 37 N. W. Rep. 969.

²⁸ Radford v. Thornell, (Iowa,) 45 N. W. Rep. 890.

²⁹ McClure v. Braniff, 75 Iowa, 38, 39

N. W. Rep. 171; State v. Adams, (Iowa,) 47 N. W. Rep. 770.

³⁰ State v. Paul, 5 R. I. 185; State v. Keeran, Id. 497.

existing nuisance.”³¹ An order of court directing that the liquor found in a certain place shall be destroyed, and that all fixtures, furniture, vessels, and all movable property on the premises, used in the unlawful business, shall be removed and sold, sufficiently describes the property to be so removed and sold.³² When the place has been closed, by order of the court, it is unlawful for the defendant to re-open it within the prescribed time; but this is only upon condition that the officer has fully and faithfully complied with the directions of the statute and of the order, in closing the place and posting notices.³³

§ 344. Injunction against Nuisance.

Where a person has violated the rights of another, or of the public, by erecting and maintaining a nuisance, such as keeping and using premises for the unlawful sale of liquor, an injunction may be granted to restrain such person from so using the premises in the future, although the nuisance has been abated.³⁴ A place where liquor has been illegally sold may be abated where the only change in the business shown is the discharge of a clerk who was alleged to have made the sales without the owner's authority, and there is evidence of subsequent sales by the owner.³⁵ But on the other hand, where the evidence shows that the owner of the building had acted in entire good faith in endeavoring to prevent illegal sales, and had, as soon as possible after discovering that liquor was so sold, terminated the lease and ousted the tenant, it would be error to decree an injunction against him.³⁶ So where, after the granting of a temporary injunction, the lessor served notice to quit on the lessee, and instituted proceedings for forcible entry and detainer against him, and prosecuted them vigorously but unsuccessfully, both before the justice and in the district court, it was held that a judgment on the final hearing, dissolv-

³¹ *Miller v. State*, 3 Ohio St. 475.

³² *Craig v. Werthmueller*, 78 Iowa, 598, 43 N. W. Rep. 606.

³³ *State v. Clark*, (Vt.) 19 Atl. Rep. 981.

³⁴ *Judge v. Kribs*, 71 Iowa, 183, 32 N. W. Rep. 324; *Danner v. Hotz*, 74 Iowa, 389, 37 N. W. Rep. 969; *Halfman v.*

Spreen, 75 Iowa, 309, 39 N. W. Rep. 512.

³⁵ *Elwood v. Price*, 75 Iowa, 228, 39 N. W. Rep. 281.

³⁶ *Drake v. Kingsbaker*, 72 Iowa, 441, 34 N. W. Rep. 199; *Eckert v. Davis*, 75 Iowa, 302, 39 N. W. Rep. 513.

ing the temporary injunction and dismissing the proceedings as to him, was not error.³⁷ The injunction should not go further than the prayer of the bill. And where the bill does not allege that defendant is engaged in the manufacture of a particular kind of liquor,—for example, beer,—and asks no relief in that respect, a decree restraining defendant from making such liquor will be modified.³⁸ The writ of injunction should specify with reasonable certainty the place to which its prohibition is intended to apply, but it need not designate the particular building intended.³⁹

§ 345. Pleading.

The petition or complaint for an injunction against a liquor nuisance, or for its abatement, must describe the place where the alleged nuisance is maintained, allege the facts constituting the nuisance, and connect the persons named as defendants with the unlawful acts complained of. Thus, a petition which alleges that the building occupied by defendants “as a drug store, is a place where spirituous liquors are unlawfully kept and sold, and is a common nuisance,” is bad on demurrer, for it does not show the liquor is kept and sold by defendants.⁴⁰ But an allegation that the unlawful sale of liquor is conducted in a building with the owner’s permission, is equivalent to saying that it is done with his knowledge and consent, and authorizes an injunction.⁴¹ And so an allegation that the defendant “is guilty of keeping and maintaining a certain tenement,” then and there used for the illegal keeping and illegal sale of intoxicating liquors, is equivalent to an allegation that he “did keep and maintain a certain tenement,” etc.; it is not so uncertain as to furnish reason for quashing the complaint.⁴² A complaint charging the keeping and maintaining a common nuisance, by keeping and maintaining a tenement used for the illegal keeping and illegal sale of intoxicating liq-

³⁷ *Morgan v. Koestner*, (Iowa,) 49 N. W. Rep. 80; *Shear v. Brinkman*, 72 Iowa, 698, 34 N. W. Rep. 483.

³⁸ *Kaufman v. Dostal*, 73 Iowa, 691, 36 N. W. Rep. 643.

³⁹ *Ver Straeten v. Lewis*, 77 Iowa, 130, 41 N. W. Rep. 594.

⁴⁰ *State v. Batchellor*, (N. H.) 20 Atl. Rep. 931. Compare *Our House v. State*, 4 Greene, (Iowa,) 172.

⁴¹ *Gray v. Stienes*, 69 Iowa, 124, 28 N. W. Rep. 475.

⁴² *Comm. v. Gallagher*, 145 Mass. 104, 13 N. E. Rep. 359.

uors, is sufficient, without any further allegation negating an authority to keep and sell the same.⁴³ When the information gives a lengthy and explicit description of the place where it is alleged the nuisance was kept and maintained, an incorrect statement as to one of the numerous particulars in the description, which could not possibly mislead the defendant, nor affect his interests prejudicially, is not to be held fatal to the prosecution.⁴⁴ An answer, in an action of this kind, which does not deny that the nuisance existed and was being maintained at the time the action was brought, but merely alleges that afterwards the defendant obtained and now holds a permit to sell liquor, is demurrable.⁴⁵

§ 346. Evidence.

The allegations of a petition for the abatement of a liquor nuisance, if not controverted, must be taken as true; and in such case it is not necessary, in order for the plaintiff to succeed, to introduce any evidence whatever.⁴⁶ But if the facts are put in issue, the complainant may proceed to make out his case by circumstantial evidence as well as direct. Thus, while the mere possession of liquor in a dwelling-house will not authorize the jury to find that it was kept with intent to sell, yet the fact that such house is a place of common resort, the stock of liquors kept there, and the circumstances under which it is kept, are evidence for the jury upon the question whether such stock was kept for use in the family or for sale.⁴⁷ So also, certificates showing the purchase of liquor from the defendant, though not shown to be public records, are competent evidence, both as corroborative of witnesses' testimony that they procured liquor from the defendant, and as an admission on his part that he had made the sales.⁴⁸ Where

⁴³ *Comm. v. Brusie*, 145 Mass. 117, 13 N. E. Rep. 378.

⁴⁴ *State v. Reno*, 41 Kans. 674, 21 Pac. Rep. 803.

⁴⁵ *Halfman v. Spreen*, 75 Iowa, 309, 39 N. W. Rep. 512; *Tibbetts v. Burster*, 76 Iowa, 176, 40 N. W. Rep. 707; *Rice v. Schlopp*, 78 Iowa, 753, 41 N. W. Rep. 603.

⁴⁶ *Bloomer v. Glendy*, 70 Iowa, 757, 30 N. W. Rep. 486; *Peisch v. Linder*, 73 Iowa, 766, 33 N. W. Rep. 133.

⁴⁷ *Comm. v. Kane*, 150 Mass. 294, 23 N. E. Rep. 903.

⁴⁸ *State v. Huff*, 76 Iowa, 200, 40 N. W. Rep. 720.

the evidence is undisputed that defendant had made sales of liquor, the only question being as to his good faith, the court does not infringe on the province of the jury, by assuming the fact, in its charge, that defendant had made sales.⁴⁹ Furthermore, a decree enjoining a liquor nuisance will not be disturbed if there is any evidence to sustain it, although an apparent preponderance of the testimony may be against the finding and judgment.⁵⁰ A general denial, it is held, does not put in issue the allegation in the petition as to the complainant's residence, and proof in support thereof need not be introduced, although, by the statute, the action must be brought by a citizen of the county.⁵¹ As an action of this kind is a civil proceeding, depositions may be taken and used in evidence.⁵²

§ 347. Practice.

The statutes commonly provide for the issuance of a preliminary injunction on *ex parte* proofs. Thus, in Iowa, the law is, that when it is made to appear to the satisfaction of the court, by affidavits or otherwise, as the court may order, that a liquor nuisance actually exists, or is being maintained, a temporary injunction shall issue as of course, without bond, upon defendant's application for a continuance. Under this act, it is held that where the complaint alleges the existence and maintenance of such nuisance, and is supported by affidavit, and the record fails to show that the court took or required any further proof, it is error to grant defendant's application for a continuance without granting the injunction.⁵³ But a final decree, abating the nuisance and for a perpetual injunction, will not be reversed on the ground that a temporary injunction was granted without notice to defendants.⁵⁴ A judge, however, has no authority to make an order at chambers abating an alleged liquor nuisance

⁴⁹ State v. Huff, 76 Iowa, 200, 40 N. W. Rep. 720.

⁵⁰ Sickinger v. State, (Kans.) 25 Pac. Rep. 868. See, also, Littleton v. Harris, 73 Iowa, 167, 34 N. W. Rep. 800.

⁵¹ Littleton v. Harris, 73 Iowa, 167, 34 N. W. Rep. 800.

⁵² *In re Rançour*, (N. H.) 20 Atl. Rep. 930.

⁵³ Tibbetts v. Burster, 76 Iowa, 176, 40 N. W. Rep. 707.

⁵⁴ State v. Douglass, 75 Iowa, 432, 39 N. W. Rep. 636.

and perpetually enjoining the maintenance of the same.⁵⁵ In a case where the defendant pleaded guilty, and filed an affidavit stating that he conducted his business in good faith, and believing that he had a right to do so, having begun it before the statute was passed, and finally abandoned it when the constitutionality of the statute was determined, and he was sentenced to pay a fine of \$1,000 and to be imprisoned in default thereof, it was held that the judgment should not be reduced, as it did not appear from the record that the trial court abused its discretion.⁵⁶

§ 348. Allowance of Attorney's Fees.

In Iowa, the statute provides that, in an action for the abatement or injunction of a liquor nuisance, the plaintiff, if successful, shall be entitled to not less than twenty-five dollars as an attorney's fee. It is held to be the duty of the court, if there is any contention as to the amount to be taxed as such fee, to hear testimony as to the value of the services rendered.⁵⁷ And if there is no evidence of the amount of labor performed by the attorney, and the record shows no evidence taken on the trial save the defendant's answer, the fee will be fixed at the statutory minimum.⁵⁸ This provision, it is held, applies as well to actions prosecuted by the county attorney in the name of the state, as to those prosecuted by a private citizen in his own name.⁵⁹ And the county attorney is entitled to have the fee taxed as costs in the case.⁶⁰

§ 349. Contempt Proceedings for Violation of Injunction.

If the person to whom the injunction is directed persists in maintaining the nuisance, or otherwise disobeys the lawful order of the court, it is a contempt, for which he may be punished.⁶¹ In some

⁵⁵ *In re Harmer*, (Kans.) 27 Pac. Rep. 1004.

⁵⁶ *State v. Maloney*, 79 Iowa, 413, 44 N. W. Rep. 693.

⁵⁷ *Craig v. Werthmueller*, 78 Iowa, 598, 43 N. W. Rep. 606.

⁵⁸ *Farley v. Geisheker*, 78 Iowa, 453, 43 N. W. Rep. 279.

⁵⁹ *State v. Douglass*, 75 Iowa, 432, 39 N. W. Rep. 686.

⁶⁰ *Farr v. Seaward*, (Iowa,) 48 N. W. Rep. 67.

⁶¹ *Schultz v. State*, 32 Ohio St. 276.

states, the proceedings for the punishment of such contempt are regulated by statute, but the decisions thereunder are not numerous. It is held that where the act permits the examination of witnesses in court, in such proceedings, their testimony may be oral and may be taken down and transcribed by a stenographer.⁶² The proceeding may properly be brought in the name of the state, and need not be instituted by the plaintiff in the original action for injunction.⁶³ As to the measure of punishment, it must not be confounded with that prescribed for the original offense of maintaining the nuisance. Because the statute establishes a certain fine or imprisonment for the main offense, it does not follow that the same penalty may be imposed for a contempt in violating the injunction.⁶⁴

⁶² Goetz v. Stutzman, 73 Iowa, 693, 36 N. W. Rep. 644.

⁶⁴ Goetz v. Stutzman, 73 Iowa, 693, 36 N. W. Rep. 644.

⁶³ Fisher v. District Court, 75 Iowa, 232, 39 N. W. Rep. 283.

CHAPTER XV.

SEARCH AND SEIZURE LAWS.

- § 350. Statutes on the Subject.
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- 353. In Whose Possession Liquor may be Seized.
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§ 350. Statutes on the Subject.

The statutes familiarly known as "search and seizure laws," which have been adopted in a number of the states, are intended to aid in the suppression of the unlawful traffic in liquors, by authorizing proceedings *in rem*, against the illicit property itself, resulting in its forfeiture or destruction, and connected with a criminal liability on the part of the person who has illegally kept them or dealt in them. Briefly described, these statutes provide that any citizen may file a verified complaint, setting forth that intoxicating liquors are kept unlawfully, or kept with intent to be sold unlawfully, in a certain described place; that thereupon a search-warrant shall issue, directing the officer to enter the suspected premises and search for the described liquors, and to seize them upon discovery; that the officer shall hold the goods in his custody, and make return of his doings upon the warrant to the magistrate; that an officer, without a war-

rant, may seize liquors found by him in any case where he would have been authorized to search for them if armed with a warrant, and may arrest any person found in the act of unlawfully selling or transporting liquor, but he shall then forthwith (or within a reasonable time) procure a warrant, and make return, as above, of what he has already done; that a hearing shall be had, after notice, to determine whether the law has been violated by the keeping of the *res*; and that, this question being determined affirmatively, the property shall be destroyed, or else forfeited and sold for the benefit of the town.¹ In some cases it is also provided that a claimant of the liquors may appeal from a judgment of condemnation, on giving a bond or entering into a recognizance.

§ 351. Constitutionality of Statutes.

The question of the constitutional validity of search and seizure laws was examined at some length in an earlier chapter, and we there found that such statutes in their usual form, with due observance of the rights of persons and property, are not open to objection under either the federal or state constitution.² It would be beyond the power of the legislature to authorize a search of a man's premises without a warrant, but a statute which authorizes the summary seizure of liquor without a warrant, is constitutional.³ And in so far as regards the disposition of the illicit property, it must be observed that a statute providing for the forfeiture and destruction of property *for a violation of law* is not in conflict with the constitutional provision that private property shall not be taken for public use without just compensation.⁴ At the same time, the statute must provide

¹ Rev. St. Me. c. 27, §§ 34-40; Laws N. H. 1887, c. 77; Laws Vt. 1886, no. 38; Pub. St. Mass. c. 100, § 30; Gen. St. Conn. p. 270, § 1; Pub. St. R. I. c. 87, § 28; Code Iowa, §§ 1544-1547.

² *Supra*, §§ 52, 53. And see Gray v. Kimball, 42 Me. 299; State v. Miller, 48 Me. 576; Lincoln v. Smith, 27 Vt. 328; Gill v. Parker, 31 Vt. 610; Allen v. Staples, 6 Gray, 491; State v. Wheeler, 25 Conn. 290; Oviatt v. Pond, 29 Conn. 479;

State v. Snow, 3 R. I. 64; *In re Liquors of McSoley*, 15 R. I. 608, 10 Atl. Rep. 659; *In re Liquors of Horgan*, 16 R. I. 542, 18 Atl. Rep. 279; State v. Fitzpatrick, 16 R. I. 54, 11 Atl. Rep. 773; Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487.

³ State v. O'Neil, 58 Vt. 140, 2 Atl. Rep. 586; Jones v. Root, 6 Gray, 435; Mason v. Lothrop, 7 Gray, 354.

⁴ State v. Snow, 3 R. I. 64; State v. Brennan's Liquors, 25 Conn. 278; Fish-

for notice to the party interested in the property, and for a trial and judicial ascertainment of the facts requisite by the statute to warrant a forfeiture, and an opportunity must be given for such party to appear and defend. If the statute fails in these particulars, it is not valid.⁵

§ 352. Nature of the Proceeding.

The proceeding authorized by the search and seizure laws, being for the purpose of forfeiting property, on the ground that it is kept for an illegal and criminal purpose, is clearly in the nature of a criminal proceeding, although the form of it is assimilated to that of a civil action.⁶ "The proceeding in question was created by statute for the purpose of condemning property that is dangerous to the public safety, and disposing of it so that it can do no harm. It is not a suit between one party and another according to the course of the common law, and would not, either in ordinary or technical language, be classed among civil actions."⁷ Yet it is not a criminal prosecution, in any exact sense of the term,—in any such sense, for example, as would require the finding of an indictment. For it is not primarily directed against any person. It is true the owner or keeper of the liquor may intervene or be made a party. But the proceeding might well begin and terminate without any disclosure of the ownership of the property or the appearance of any claimant. The proceeding is therefore to be regarded as one *in rem*, against the liquors for their condemnation as forfeited property, and the complaint is in the nature of a libel.⁸ Important consequences follow from the observance of this distinction. Thus, the proceeding not being strictly a criminal action, the issues are to be tried by the rules applied in the trial of civil causes.⁹ Again, the determination being *in rem*, it fixes

er v. McGirr, 1 Gray, 1, 61 Am. Dec. 381; Comm. v. Intoxicating Liquors, 107 Mass. 396; Bishop, Stat. Crimes, § 993.

⁵State v. Snow, 3 R. I. 64; Greene v. James, 2 Curt. C. C. 187; Fisher v. McGirr, 1 Gray, 1, 61 Am. Dec. 381; Hibbard v. People, 4 Mich. 125; People v. Haug, 68 Mich. 549, 37 N. W. Rep. 21.

⁶Hibbard v. People, 4 Mich. 125; State v. Intoxicating Liquors, 40 Iowa, 95;

State v. Robinson, 49 Me. 285; State v. Liquors and Vessels, 80 Me. 57, 12 Atl. Rep. 794.

⁷State v. One Bottle of Brandy, 43 Vt. 297.

⁸State v. Barrels of Liquor, 47 N. H. 369; Hine v. Belden, 27 Conn. 384; 2 Black, Judgm. § 799.

⁹State v. Barrels of Liquor, 47 N. H. 369.

the *status* of the property as to all the world, and notice to the person in whose possession the liquor happens to be when seized is all the notice required, and the owner is bound by the proceedings whether he has notice or not.¹⁰ So also, this proceeding is entirely distinct from any prosecution which may be instituted against the person who had the liquors unlawfully in possession. And hence, in such prosecution, it is immaterial what sentence was passed upon the liquors; ¹¹ and conversely, a conviction of the person is no bar to a proceeding against the goods.¹² These statutes, it is held, refer to *place*, and cannot be extended to process against the person. Hence such process cannot be issued for the search of a person who is alleged to travel about with a stock of liquor on his person, making sales of the same.¹³

§ 353. In Whose Possession Liquor may be Seized.

It is held that when intoxicating liquor is in transit from a vendor without the state to a purchaser within the state, and is in the hands of a carrier, to be delivered by him on payment of the price, the carrier is the agent of the seller, and as his possession is coupled with an intention to complete the sale, within the state, by collecting the money and delivering the goods, it is unlawful. Hence the liquor is subject to seizure and forfeiture in the hands of the carrier.¹⁴ And so, liquor in the possession of a warehouseman, but intended by the owner for unlawful sale within the state when it shall reach its destination, is liable to be seized, and the lien of the warehouseman is no bar to the proceeding, although he has no intention to violate the law.¹⁵ But the fact that one who is a mere bailee of the owner of liquor, with no authority from him to make sales, designs illegally to sell such liquors within the state, will not work a forfeiture of the

¹⁰ Johnson v. Williams, 48 Vt. 565.

¹¹ State v. McCann, 61 Me. 116.

¹² Sanders v. State, 2 Iowa, 230.

¹³ State v. Grames, 68 Me. 418.

¹⁴ State v. O'Neil, 58 Vt. 140, 2 Atl. Rep. 586; State v. U. S. Express Co., 70 Iowa, 271, 30 N. W. Rep. 568. But intoxicating liquors found in a railroad

station in transit to a Soldiers' Home on federal territory within the state, are not liable to seizure, although they are to be sold by the store-keeper of the home. State v. Cobaugh, 78 Me. 401, 6 Atl. Rep. 4.

¹⁵ State v. Intoxicating Liquors, 50 Me. 506.

property.¹⁶ Intoxicating liquors purchased by municipal officers, without authority and in contravention of the statute,¹⁷ or held by such officers without being marked and identified as the law requires,¹⁸ are liable to be seized and adjudged forfeited. And a warrant may be issued to search for and seize liquor already taken by an officer from a person engaged in illegally transporting it, and still held by the officer.¹⁹

§ 354. Complaint or Information.

If the complaint and warrant for the seizure of liquor, under these laws, follow the language of the statute or the forms which it prescribes, it will in general be sufficient, and the circumstances need not be alleged with a particularity of averment beyond that.²⁰ Although the law requires the information to be made by a resident of the county, it is not necessary that the information should show such residence on the part of the informant; the fact may be established by independent proof.²¹ But where the statute authorizes the issue of a search-warrant for liquors "owned or kept by any person named or described as particularly as may be," the information must allege ownership in some specific person.²² The complaint is also required to describe the location of the property to be searched for. And this should be done with as much precision and accuracy as the circumstances will permit.²³ Generally, the statutes do not allow a

¹⁶ State v. Intoxicating Liquors, 63 Me. 121.

¹⁷ State v. Intoxicating Liquors, 68 Me. 187.

¹⁸ Androscoggin R. Co. v. Richards, 41 Me. 233.

¹⁹ Allen v. Staples, 6 Gray, 491.

²⁰ State v. Intoxicating Liquor, 38 Vt. 387; State v. Welch, 79 Me. 99, 8 Atl. Rep. 348; State v. Howley, (Me.) 9 Atl. Rep. 620; Comm. v. Intoxicating Liquors, 13 Allen, 52; Comm. v. Grady, 108 Mass. 412; Comm. v. McLaughlin, Id. 477; Comm. v. Hazeltine, Id. 479; Comm. v. Intoxicating Liquors, 107 Mass. 216.

²¹ State v. Blair, 72 Iowa, 591, 34 N. W. Rep. 432.

²² State v. Intoxicating Liquors, 64 Iowa, 300, 20 N. W. Rep. 445.

²³ Where the information was entitled "State of Iowa, Clayton County," held, that it was unnecessary to allege in the information that the liquors were in Clayton county. State v. Thompson, 44 Iowa, 399. But a complaint alleging that certain intoxicating liquor is kept in a specified place, etc., is not supported by a verdict which finds that the liquor was owned or kept there. Comm. v. Intoxicating Liquors, 4 Allen, 601. See *infra*, § 357.

warrant to be issued for the search of a dwelling-house unless it is alleged to be a place of common resort for tippling purposes or to be kept as a dram-shop. In compliance with this requirement, an averment that the house is occupied by the defendant "as a place of common resort kept therein," is sufficient.²⁴ The complaint must also charge the illegality of the keeping, or intention to sell the liquor in violation of law. To this end, an allegation that the property "was kept for the purpose of sale, without authority, within this state, against the statute," is sufficient.²⁵ So also is an allegation that the liquors described were kept by the defendant "for sale within this state, in violation of law, upon said date."²⁶ But a complaint which alleges that the liquors were in the possession of the accused, and were intended for unlawful sale within the state, but not alleging an unlawful intention to sell by the accused, is held to be insufficient.²⁷ In Vermont, it is held that the complaint need not be signed by the complainants, although the statute requires it to be reduced to writing by the magistrate.²⁸ An averment, in search and seizure process, "that defendant had been before convicted of keeping and depositing in [the state] intoxicating liquors with intent that the same should be sold in that state in violation of law," is sufficient, when coupled with particular averments of the time, place, and court in which the conviction was had, to charge a former conviction for the offense of keeping liquors with the intention of illegally selling them, so as to make the accused liable to the added penalty provided by statute upon conviction for a repeated offense.²⁹ Where that provision of the statute which allows the seizure of liquor without a warrant is silent as to the time of making the complaint, it may be made after the seizure as well as before.³⁰ But in such case, only the officer who makes the seizure and apprehends the keeper of the place is authorized to make the complaint.³¹

²⁴ *Comm. v. Leddy*, 105 Mass. 381.

²⁵ *In re Liquors of Young*, 15 R. I. 243, 3 Atl. Rep. 3.

²⁶ *In re Liquors of Hoxie*, 15 R. I. 241, 3 Atl. Rep. 1; *Comm. v. Intoxicating Liquors*, 4 Allen, 593.

²⁷ *State v. Miller*, 48 Me. 576.

²⁸ *Gill v. Parker*, 31 Vt. 610.

²⁹ *State v. Longley*, 79 Me. 52, 7 Atl. Rep. 902.

³⁰ *State v. Intoxicating Liquors*, 58 Vt. 594, 4 Atl. Rep. 229.

³¹ *Fenner v. State*, 3 R. I. 107.

§ 355. Verification of Complaint.

As it is a universal rule of American constitutional law that search-warrants may not be issued except upon probable cause supported by oath or affirmation, the complaint or information, under the statutes we are considering, is always required to be verified. But a statutory requirement that the search-warrant "shall be supported by the oath of the complainant," is complied with by the complainant's making oath to the complaint upon which the warrant is issued.³² Where the warrant is issued upon the oath of the complainants "that they have reason to believe and do believe the allegations in said complaint to be substantially true," this is considered sufficient, and it is not necessary that the facts upon which the belief was founded should be sworn to.³³ Further, it is held that the oath does not form a part of the complaint, although incorporated therein, and hence the prosecution is not required to prove all the facts detailed in the oath.³⁴ A complaint, under these laws, may be made on affirmation by one who is conscientiously scrupulous of taking an oath, notwithstanding the statute requires a "sworn complaint."³⁵ And the certificate of the magistrate before whom the complaint is made, reciting the fact that the complainant made solemn affirmation to the complaint, is conclusive not only that the complainant was "conscientiously scrupulous of taking an oath," but that he "formally affirmed under the pains and penalties of perjury."³⁶ In some states, a special affidavit is required to be made when the warrant is for the search of a dwelling-house; but it is held that this is not needed when the place complained of is described merely as a "house occupied and kept by" a certain named person.³⁷

³² *Downing v. Porter*, 8 Gray, 539; *Allen v. Staples*, 6 Gray, 491.

³³ *Lowrey v. Gridley*, 30 Conn. 450.

³⁴ *Comm. v. Intoxicating Liquors*, 142 Mass. 470, 8 N. E. Rep. 421.

³⁵ *State v. Welch*, 79 Me. 99, 8 Atl. Rep. 348.

³⁶ *State v. Devine*, (Me.) 13 Atl. Rep. 128.

³⁷ *Sanders v. State*, 2 Iowa, 230.

§ 356. Requisites of Search-Warrant.

A search-warrant, issued in pursuance of the statutes under consideration, is a sufficient justification for the officer acting under it, where the magistrate has jurisdiction, and the face of the warrant discloses sufficient ground for his judicial action.³⁸ As to the facts and recitals necessary to appear in the warrant, much will depend upon the terms of the particular statute. Thus, if the statute requires the insertion of the allegation of probable cause for the search, it cannot safely be omitted.³⁹ The warrant must also show that it was founded upon the oath required by law.⁴⁰ And it must recite the names of the complainants.⁴¹ But it need not direct that the complainants be summoned to appear as witnesses at the hearing of the complaint.⁴² Nor need it name the owner of the liquors, if it names the person in whose possession they are found.⁴³ Where the statute provides that a warrant to search a dwelling-house cannot be issued except upon the testimony of witnesses, reduced to writing, that there is reasonable ground for believing that spirituous liquors are kept there for unlawful sale, the warrant must show a compliance with this preliminary.⁴⁴ And where the act provides that "no warrant shall issue for the search of a dwelling-house, unless a tavern, store, eating-room, or place of common resort, is kept therein," a description of a dwelling-house as "a place of common resort" merely, is not sufficient. "The statute contemplates a place *kept* for the purposes of common resort, *i. e.*, appropriated to such purposes by the occupant, keeper, or person having the control of the premises."⁴⁵ In Maine, it is required that the warrant contain an order to arrest the accused. And it is said that if, instead of that, he is summoned,

³⁸Thurston v. Adams, 41 Me. 419. The warrant, under Gen. St. Conn. p. 270, § 5, to search for liquors, need not state that a complaint has been made, etc., all this appearing in the complaint and justice's certificate, both on the same paper with the warrant. Hornig v. Bailey, 50 Conn. 40.

³⁹Comm. v. Intoxicating Liquors, 105 Mass. 178.

⁴⁰Comm. v. Intoxicating Liquors, 6 Allen, 599.

⁴¹Guenther v. Day, 6 Gray, 490.

⁴²Downing v. Porter, 8 Gray, 539.

⁴³Allen v. Staples, 6 Gray, 491.

⁴⁴State v. Staples, 37 Me. 228; McGlinchy v. Barrows, 41 Me. 74.

⁴⁵Comm. v. Intoxicating Liquors, 97 Mass. 332.

and appears, and the case is continued, and then an amendment allowed by the court, the proceedings are illegal.⁴⁶ A direction in the warrant that the officer "make due return of this warrant" is sufficient.⁴⁷

§ 357. Description of Premises to be Searched.

By a well-known principle of constitutional law, search-warrants are required to contain a description of the premises to be searched so specific and accurate as to avoid any unnecessary or unauthorized invasion of the right of privacy. There is perhaps no single test which could be invariably applied to the description in the warrant, to determine its sufficiency. But it has been said, in general terms, that the description will be sufficiently certain, if it is such as would be required in a deed to convey a specific parcel of real estate.⁴⁸ Further, the premises must be particularly described both in the warrant and in the complaint on which it is founded. And if the warrant merely directs the entry and search of the building "above described," meaning certain premises described in the complaint, it is void.⁴⁹ And the two descriptions must either be verbally identical or at least so closely corresponding that the differences between them could not possibly occasion doubt or mistake.⁵⁰ But a variance in unimportant or unessential details will not necessarily invalidate the process. Thus, where the complaint described the premises as formerly owned by A., and the warrant as formerly owned by B., it was held that the repugnant words might be rejected as unimportant, if, independent of them, the description given was sufficient clearly to designate the place to be searched.⁵¹ And so, where the only difference between the description in the complaint and that in the warrant was that the former located the premises at number 197 on a designated street, and the latter at number 179, and it appeared that the person named occupied only number 197 on that street, it was

⁴⁶ State v. Leach, 38 Me. 432.

⁴⁷ Comm. v. Intoxicating Liquors, 97 Mass. 62.

⁴⁸ State v. Bartlett, 47 Me. 388; State v. Robinson, 33 Me. 564.

⁴⁹ Comm. v. Intoxicating Liquors, 109 Mass. 371.

⁵⁰ Comm. v. Intoxicating Liquors, 115 Mass. 145.

⁵¹ State v. Bartlett, 47 Me. 388.

held that a search of number 197 was justified by the warrant.⁵² It is generally considered that the description in the warrant will be sufficiently certain and precise if it designates the house by its proper number on the named street in a specified city and county.⁵³ And if the house is known by two numbers, and is as well known by one as by the other, it may be described in the complaint and warrant by either number.⁵⁴ And the warrant is not invalidated by so misnaming one street in the description of the place to be searched as to make the application of the whole description impossible, if in other respects the place is described truly, and so as to identify it with the place described in the complaint.⁵⁵ The warrant sufficiently describes the premises by an averment that the house is occupied by the defendant and situated on the east side of Blake street (the house being in fact so occupied and situated east of Blake street, but not adjoining it,) although there be another house between that of the defendant and the street, and access to defendant's house be by an alley running from the street past the other tenement.⁵⁶ It has also been held that a description of the place to be searched, by giving the owner's name and the kind of liquors which he is believed to keep, will be sufficient.⁵⁷ In the next place, as to outbuildings and appurtenances of the house, it is generally considered that they must be mentioned in the warrant, in order to justify a search of them. Thus a warrant directing the officer to search a certain dwelling-house, described as "the premises" occupied by a certain person, will not authorize a forcible entry into a barn belonging to such person, adjoining the dwelling-house but not integrally a part of it.⁵⁸ But a

⁵² *State v. Robinson*, 49 Me. 285.

⁵³ *Comm. v. Intoxicating Liquors*, 150 Mass. 164, 22 N. E. Rep. 628.

⁵⁴ *Comm. v. Intoxicating Liquors*, 6 Allen, 596.

⁵⁵ *Downing v. Porter*, 8 Gray, 539.

⁵⁶ *State v. Minnehan*, (Me.) 22 Atl. Rep. 177. The description is sufficient when the complaint alleges that intoxicating liquors are kept and deposited "in a certain wagon on the fair ground on the easterly side of Union Hall, in Searsport." *State v. Knowlton*, 70 Me.

200. But the following description—"at W., in a certain distillery there, situate about one and one-half miles northeasterly from H. furnace"—is not sufficient. *Comm. v. Intoxicating Liquors*, 97 Mass. 334. The place of keeping the liquor may be described in one sentence in the complaint as a "cellar" and in another as "the above mentioned house." *Comm. v. Intoxicating Liquors*, 105 Mass. 181.

⁵⁷ *State v. Thompson*, 44 Iowa, 399.

⁵⁸ *Jones v. Fletcher*, 41 Me. 254.

designation of a certain dwelling-house and appurtenances, occupied by the defendant, is sufficient to authorize the officer to search an outbuilding on the same lot with the house and near to it, but separated from it by an open space or passage-way, and occupied mainly as a wood-shed for the use of the house.⁵⁹ Again, a warrant directing the search of the dwelling-house of a person, authorizes the search only of the house occupied by him, and it is trespass if the officer searches a house owned by him but occupied by another.⁶⁰ So a warrant to search premises "occupied by A.," and describing by metes and bounds a block of two dwelling-houses, separated by a partition-wall, and occupied one by A. and the other by B., and to seize certain liquors if "there" found, does not authorize a search of B.'s house.⁶¹ And a warrant to enter a building occupied by a person named, and seize liquors there kept by him, does not authorize a seizure of liquors in a closet in a tenement of another person in the same house, although the officer believes the closet is in the occupation of the first-named person.⁶² But a barrel of liquor belonging to A. may be seized in the room of B., although described as "in the house occupied by A.," if the faucet thereto passes through a partition into A's room.⁶³ Finally, it is no objection to a search-warrant, under these statutes, that it directs the search of several different places. "A separate warrant for each suspected place to be searched is not called for, either by the letter or spirit of the constitution, nor requisite for the protection of the public peace or individual security. To require it would occasion useless delay and expense, and tend to defeat the salutary objects of the law."⁶⁴

§ 358. Description of Liquors to be Seized.

It is also required, either by the constitution or the statute, that the search-warrant shall describe, as nearly as may be, the particu-

⁵⁹ *State v. Burke*, 66 Me. 127. See, also, *State v. Liquor*, 38 Vt. 387; *Lowrey v. Gridley*, 30 Conn. 450; *Comm. v. Intoxicating Liquors*, 146 Mass. 509, 16 N. E. Rep. 298.

⁶⁰ *McGlinchey v. Barrows*, 41 Me. 74.

⁶¹ *Flaherty v. Longley*, 62 Me. 420.

⁶² *Comm. v. Newton*, 128 Mass. 420.

⁶³ *Comm. v. Intoxicating Liquors*, 105 Mass. 381.

⁶⁴ *Gray v. Davis*, 27 Conn. 447.

lar things to be seized. As regards the kind of liquor to be taken under the warrant, it is held sufficient to describe it as "certain spirituous and intoxicating liquors, to wit, rum, gin, brandy," etc.⁶⁵ And the fact that some of the kinds of liquor specified are not found at all, will not invalidate the seizure of those kinds which are found.⁶⁶ The form of description commonly employed in these warrants is, "a certain quantity of rum," or some other specified kind of liquor, or several kinds, "being about and not exceeding one hundred gallons," or some other specified quantity, "contained in certain barrels, kegs, jugs, jars, bottles, decanters, and other vessels." And this form is adjudged good and sufficient.⁶⁷ Of course the officer is not bound to find the entire quantity mentioned in the warrant. For example, where the complaint and warrant described the liquors as certain quantities of rum, gin, brandy, whisky, strong beer, ale, and wine, "being about and not exceeding 500 gallons each," and the officer's return certified that he had seized "the liquors described in the within warrant, to wit, about 125 gallons of whisky, about 49 gallons of gin, about 57 gallons of rum, and about 12 gallons of wine," it was held that the variation between the quantities set forth in the warrant and those named in the return was not a sufficient cause for dismissing the complaint.⁶⁸ The converse case would present a more difficult question; namely, would the officer be justified in seizing a *larger* quantity of liquor than that specified in the warrant? If the warrant described the property as "not exceeding" a certain quantity, we apprehend that these terms would operate as a limitation on the officer's power. But in a case in Connecticut, where the complaint and warrant described a certain quantity of spirituous liquor "to wit, ten gallons of brandy, ten gallons of rum," etc., and the officer seized a hogshead containing thirty gallons of rum and a barrel containing eight gallons of rum, it was held that the specification of the quantities of the liquors under the *videlicet* was intended as a description of them, and not to limit their quantities, and that the

⁶⁵ State v. Whisky, etc., 54 N. H. 164.

⁶⁶ Comm. v. Intoxicating Liquors, 13 Allen, 52.

⁶⁷ *In re Horgan's Liquors*, 16 R. I. 542, 18 Atl. Rep. 279; *State v. Fitz-*

patrick, 16 R. I. 54, 11 Atl. Rep. 773; *Downing v. Porter*, 8 Gray, 539.

⁶⁸ Comm. v. Intoxicating Liquors, 97 Mass. 63. See, also, *Comm. v. Intoxicating Liquors*, 13 Allen, 52.

authority of the officer was not limited to the quantity named in the warrant.⁶⁹ But it may be otherwise as to the *kinds* of liquor to be seized. If the warrant directs the seizure of "certain intoxicating liquors," and then, under a *videlicet*, specifies certain particular kinds, the officer will not be justified in seizing any other kinds than those specified; for here the *videlicet* limits the general expression preceding it by what follows.⁷⁰

§ 359. Execution of Warrant.

A warrant to search for and seize intoxicating liquors, issued under the statute in that behalf, may be executed in the night-time. At common law, it will be remembered, a search-warrant was always directed to be executed by day, and it was doubtful whether it could be executed at night, even in the absence of any limitation as to time in the direction. But this kind of search-warrant is not a common law warrant, but is entirely governed by the statute. And inferences drawn from the statute, as well as the fact that it does not prescribe any time for executing the warrant, show that it may well be executed at night.⁷¹ As to the power of the officer to use force for the purpose of effecting an entry to the suspected premises, it is probable that this species of process should be regarded as criminal in its nature, so as to justify the officer in breaking outer doors, after demand and refusal of admission. And in one case, when an officer, acting under a warrant which directed him to search the plaintiff's station-house for certain liquors alleged to be unlawfully stored there, coming to the building after the usual time for closing it, and finding no person of whom he could demand admission, entered by force and took away the liquors, it was held that such entry was justifiable.⁷² Such warrant may be served by a constable, authorized by the general law to serve such process, although no direction is given to him in the warrant, but is given to other officers, and it may be amended

⁶⁹ State v. Brennan's Liquors, 25 Conn. 278.

⁷⁰ Mallet v. Stevenson, 26 Conn. 428.

⁷¹ Comm. v. Hinds, 145 Mass. 182, 13 N. E. Rep. 397.

⁷² Androscoggin R. Co. v. Richards, 41 Me. 233.

by inserting such direction at any time before final judgment.⁷³ The person found in the possession of the liquors, and intending unlawfully to sell the same, may, if it be so alleged, be arrested.⁷⁴ The officer who arrests a person in the act of illegally transporting liquors in a wagon, (under a statute authorizing such arrest in those circumstances,) may detain the wagon and horses for such time as is reasonably necessary to remove the liquors from the wagon; and he is not bound to seek out the owner of the horses and wagon and restore them to him, even if not privy to such transportation; and he may remove them from the travelled part of the highway to prevent an obstruction thereof; and he may take them into his own barn for the purpose of saving the horses from suffering, until called for by the owner.⁷⁵

§ 360. What Property may be Seized.

An officer acting under a warrant duly issued to search for intoxicating liquors, cannot lawfully seize liquors not described in the warrant; if he does, he is liable to an action by the owner thereof.⁷⁶ But where the warrant, after describing the liquors to be seized, added that they were "owned or kept by the said G., and intended by him to be sold in violation of the act," it was held that this language was merely that of averment, and not of description, and that it was therefore not essential to the justification of the officer serving the warrant that the liquors seized should in fact be owned or kept by the person named.⁷⁷ And the seizure is not avoided by the fact that some liquor was seized which was not intoxicating.⁷⁸ As to the power of the officer to seize a greater or less quantity of liquor than that specified in the warrant, the reader is referred to a previous section, where the question was examined.⁷⁹ Under the law in Maine, it has been held that the casks or vessels containing the liquor are not subject to seizure, and the officer is liable if he takes them.⁸⁰ But, if this decis-

⁷³ State v. Hall, 78 Me. 37, 2 Atl. Rep. 546.

⁷⁴ State v. Dunphy, 79 Me. 104, 8 Atl. Rep. 344.

⁷⁵ Jones v. Root, 6 Gray, 435.

⁷⁶ Arthur v. Flanders, 10 Gray, 107.

⁷⁷ Gray v. Davis, 27 Conn. 447.

⁷⁸ Comm. v. Intoxicating Liquors, 113 Mass. 13.

⁷⁹ *Supra*, § 358.

⁸⁰ Black v. McGilvery, 38 Me. 287.

ion was right, it would frequently subject the officer to a most embarrassing dilemma; and it is obvious that the law should not be so construed if a fair reading of its terms will permit any other interpretation. A seizure of liquors upon a complaint for keeping the same cannot be sustained where the proof shows that the liquors were seized while being transported, when another and distinct statute provides for a seizure while in transit.⁸¹

§ 361. Officer's Return to Warrant.

An officer's return upon a search-warrant should show that the liquors seized were the same liquors described in the warrant. This is sufficiently done by a return in the following words: "By virtue of this warrant, I have seized the following described liquors," describing them as in the warrant.⁸² The return should also show that the place searched was the identical place to which the warrant directed him. But it is not necessary to copy the description into the return. If the tenement is explicitly described in the complaint and warrant, the officer may return that he searched the "within described premises" and seized the liquor therein.⁸³ By the provisions of the statutes in some of the states, if the officer is prevented from seizing the liquors by their being destroyed, he may arrest the keeper. In that case, he must make return on the warrant of his being so prevented, and how, and as near as may be the quantity destroyed; and if there is any uncertainty in the return, as to the kind and quantity of the liquor, it cannot be objected to by the person who, by his violence, prevented the officer from seizing it.⁸⁴ Officers' returns upon these warrants are admissible as part of the records of judgments; and the inventory therein is conclusive until the contrary appears; the principle followed in replevin applies.⁸⁵ Parol evidence as to the date of the seizure is admissible to sustain the complaint, but not to contradict the return.⁸⁶

⁸¹ State v. Roach, 74 Me. 562.

⁸² State v. Hall, 81 Me. 34, 16 Atl. Rep. 329.

⁸³ Comm. v. Intoxicating Liquors, 6 Allen, 596.

⁸⁴ State v. Stevens, 47 Me. 357.

⁸⁵ State v. Lang, 63 Me. 215. See State v. Howley, 65 Me. 100.

⁸⁶ State v. McCann, 59 Me. 383.

§ 362. Status of Property under Seizure.

It is said, in Vermont, that intoxicating liquor, seized and condemned according to law, is without rights, and that a claimant of such liquor is not entitled to a trial by jury.⁸⁷ This is perhaps going further than either the nature of the subject or the adjudications would fully warrant. And while the statutes provide a summary mode of trial in the first instance, they almost invariably allow an appeal to a court where a jury is called. But the property, in the interval between its seizure and the final judgment, is regarded as in the custody of the law. And hence it cannot be taken from the possession of the officer by proceedings in replevin.⁸⁸ And if such proceedings were commenced, the officer would have no authority to consent to an entry of judgment on the plaintiff's payment of costs.⁸⁹ So where the jurisdiction of a state court has attached to certain liquors seized by an officer of that court, by virtue of process under the prohibitory liquor law of the state, such officer cannot be, by a federal court, attached for contempt for refusing to obey the command of a writ of replevin issuing out of the federal court.⁹⁰ In the keeping of the liquor seized, the officer is only bound to exercise such a degree of care and diligence as prudent men use in the care of their own goods; and the use of such care is sufficiently alleged by an averment that they were kept in a safe, suitable, and proper place.⁹¹

§ 363. Arrest or Seizure without Warrant.

Unless authorized by a statute, an officer cannot justify entering a building and seizing intoxicating liquors and the vessels containing the same, which were illegally kept by the owner thereof, unless he had and acted under a warrant.⁹² But the statutes in many of the states empower an officer to seize such liquor whenever found by him under circumstances which would have justified his search for and

⁸⁷ State v. Smith, 55 Vt. 82.

⁸⁸ Funk v. Israel, 5 Iowa, 438.

⁸⁹ Fries v. Porch, 49 Iowa, 351.

⁹⁰ Senior v. Pierce, 31 Fed. Rep. 625.

⁹¹ Perkins v. Gibbs, 29 Vt. 343.

⁹² Reed v. Adams, 2 Allen, 413.

seizure of it if armed with a warrant, and also authorize him, without a warrant, to arrest any person found in the act of illegally transporting liquor in the state. But having so acted, he must then, according to the statutes, proceed within a reasonable time to procure a warrant, to retroactively justify the arrest or seizure. If he neglects to do this, he becomes liable as a trespasser.⁹³ When no sufficient reason is given for a longer delay, the time which elapses before he procures a warrant should not exceed twenty-four hours.⁹⁴ When the officer has so seized liquors illegally kept, he must make a complaint and take out a warrant in the regular mode prescribed by the statute. But as the liquors are now in his own custody, the complaint should allege that they *were* unlawfully kept and deposited in the place when and where the officer found them, and that they *were* then and there intended for sale in violation of law. And upon obtaining the warrant, he is to seize the liquors *nunc pro tunc*, and make his return thereon that the liquors were seized on such warrant.⁹⁵ It is not necessary, to justify the arrest of a person without a warrant, for illegally transporting liquors, to prove that a warrant was afterwards procured against the liquors seized at the same time.⁹⁶ And in an action against the officer for making such an arrest, the warrant obtained the next day, and the complaint on which it was issued, are admissible in evidence for the officer; and so also are declarations of the plaintiff, made the day before the arrest, tending to show that he was, at the time of the arrest, actually so transporting such liquor, although such declarations were not known to the officer when he made the arrest.⁹⁷ It is held that an officer cannot justify an arrest without a warrant, on this ground, without showing that he had reasonable proof at the time of the arrest that the person was illegally transporting the liquors; and it is not sufficient that the officer acted in good faith and had reasonable cause to suspect that such was the case.⁹⁸ And a conviction before a justice of the peace, upon a complaint for illegally transporting liquors, from which an appeal has

⁹³ Kent v. Willey, 11 Gray, 368.

⁹⁴ Weston v. Carr, 71 Me. 356.

⁹⁵ State v. Dunphy, 79 Me. 104, 8 Atl.

⁹⁶ Kennedy v. Favor, 14 Gray, 200.

⁹⁷ Mason v. Lothrop, 7 Gray, 354.

⁹⁸ Kennedy v. Favor, 14 Gray, 200.

been taken, is not sufficient evidence of probable cause to believe that the defendant was so transporting the liquors, to justify the previous arrest of the defendant and seizure of the liquors by an officer without a warrant.⁹⁹

§ 364. Notice to Claimants.

The liquor having been seized by the officer and his return made, the next step in the proceedings is to give notice of the hearing to the person from whose possession the liquor was taken and to claimants generally. This notice, being provided for by the statute, is essential to the validity of all further proceedings. But the omission of it will not invalidate the previous steps; it will not make the prior act of seizing the liquors a trespass.¹⁰⁰ And one who appears as a claimant of the liquors cannot object that no notice has been given to others.¹⁰¹ The recitals of the notice should of course be sufficiently accurate to impart to the claimant beyond a reasonable doubt all the information to which he is entitled. But it is held that a recital that the seizure was made under a warrant issued by a district court, when in fact it was made under a warrant issued by a special justice thereof, does not invalidate the proceedings.¹⁰² The notice is required to specify the liquors seized and the place where they were found, so as to clearly identify them, in order that persons interested may be duly informed of the proceedings against their property and have an opportunity to appear and defend their rights. But it does not appear that the same particularity of description is requisite as in the complaint and warrant. Thus, where the notice specified the place where the liquor was seized as "a certain building occupied by A., in said town," on a day named, and it did not appear that A. occupied any other building, it was held, after A. had entered a general appearance, that the notice was sufficient.¹⁰³ In Massachusetts, the law

⁹⁹ *Mason v. Lothrop*, 7 Gray, 354.

¹⁰⁰ *Voetsch v. Phelps*, 112 Mass. 407.

¹⁰¹ *Comm. v. Intoxicating Liquors*, 6 Allen, 596. And one appealing as claimant of liquors which have been seized cannot object to defects in the notation and notice. *State v. Miller*, 48 Me.

576; *State v. Brennan's Liquors*, 25 Conn. 278.

¹⁰² *Comm. v. Intoxicating Liquors*, 128 Mass. 72.

¹⁰³ *Comm. v. Intoxicating Liquors*, 146 Mass. 509, 16 N. E. Rep. 298. See, also, *Same v. Same*, 6 Allen, 599.

requires that notice shall be given to the keeper or claimant of the seized liquors within twenty-four hours after the seizure. This time, it is ruled, is exclusive of Sunday.¹⁰⁴ And where various original documents in the case show clearly that such notice was issued within the time limited, an error in the record of the court, by which a later date is inserted as the time of issuing the notice, is immaterial.¹⁰⁵

§ 365. Jurisdiction and Procedure.

A magistrate who issues a warrant for the seizure of liquors has jurisdiction if the liquors seized correspond to those described in the complaint in respect to the kinds of liquors found, and are within the quantities named.¹⁰⁶ And as these proceedings are criminal in their nature, the jurisdiction of the justice is not affected by the value of the liquors to be seized.¹⁰⁷ But as the proceedings, in the first instance, are before a court of limited or inferior jurisdiction, the facts essential to its jurisdiction must appear on the face of the proceedings, otherwise there will be no presumption in favor of the jurisdiction.¹⁰⁸ But neither the jurisdiction of the court nor the validity of the proceedings is affected by the omission to summon the complainants as witnesses as directed by the statute.¹⁰⁹ In one state the law provides that the officer making a seizure of liquors "shall forthwith proceed to prosecute for the forfeiture thereof in the manner provided by law." But it is held that this clause is directory merely, and that the neglect of an officer to prosecute speedily does not exempt liquors from forfeiture which were kept for sale in violation of law; the forfeiture depends upon the breach of the law, and not upon the diligence of the officer.¹¹⁰ Upon the proper notices

¹⁰⁴ *Comm. v. Intoxicating Liquors*, 97 Mass. 601. The court observed: "Sunday is not ordinarily to be reckoned in computing the time within which an act is to be done, where the time limited is less than a week."

¹⁰⁵ *Comm. v. Intoxicating Liquors*, 4 Allen, 593.

¹⁰⁶ *Comm. v. Intoxicating Liquors*, 13 Allen, 561.

¹⁰⁷ *State v. Arlen*, 71 Iowa, 216, 32 N.

W. Rep. 267, expressing disapproval of *Sullivan v. Oneida*, 61 Ill. 242.

¹⁰⁸ See *Jones v. Fletcher*, 41 Me. 254; *Guptill v. Richardson*, 62 Me. 257; *State v. Intoxicating Liquors*, 80 Me. 91, 13 Atl. Rep. 403.

¹⁰⁹ *Comm. v. Intoxicating Liquors*, 108 Mass. 290.

¹¹⁰ *In re Liquors of Hoxie*, 15 R. I. 241, 3 Atl. Rep. 1.

being given, any person claiming the liquor in question may be made a party to the proceedings; and the court may require security for costs, as the terms of a claimant's being admitted as a party.¹¹¹ When liquors are seized upon a warrant and their keeper arrested at the same time, both must be brought by the officer before the magistrate who issued the warrant; but from that time the proceedings as to each, the trial and judgment, are separate and distinct as in two cases; and in case of an appeal, they are to be entered and tried in the appellate court as two cases.¹¹² The jury are to pass upon the *status* of the *res*, as liable or not liable to forfeiture. But when the liquors are described in the same way in the complaint, the warrant, and the officer's return, it is immaterial whether the issue to the jury is, whether the whole or any part of the liquors *described in the complaint* were kept for unlawful sale, or whether the whole or any part of the liquors *actually seized* were so kept.¹¹³ A general verdict of guilty or not guilty, without any special findings, is all that is usual or necessary in prosecutions for keeping liquors for illegal sale.¹¹⁴ The ground of condemnation of the liquors seized must be sought in the statute. Where, however, the act denounces the keeping of liquor for illegal "sale or distribution," an officer can seize property for either of the alternative causes, (both being named in the complaint,) and the court may condemn for either, as the case presents itself to them on proof.¹¹⁵ As to the costs in these cases,—under a statute providing that when liquor is taken on a search-warrant, and no one is made defendant, the costs shall be paid as in criminal cases where the prosecution fails, a justice issuing such process can recover fees therefor against the county, although no liquors were found.¹¹⁶ And so, in the same circumstances, the officer earns his fee by making the search, though he finds nothing to seize.¹¹⁷ The statutes commonly provide for summary proceedings before a magistrate or inferior court, in the first instance, but allow an appeal to a court where a jury is called. In this con-

¹¹¹ State v. Pecker, 47 N. H. 369.

¹¹² State v. Miller, 48 Me. 576.

¹¹³ Comm. v. Intoxicating Liquors, 6 Allen, 596.

¹¹⁴ State v. Nowlan, 64 Me. 581.

¹¹⁵ State v. Liquor, 38 Vt. 387.

¹¹⁶ Garrett v. Polk County, 78 Iowa, 108, 42 N. W. Rep. 618.

¹¹⁷ Byram v. Polk County, 76 Iowa, 75, 40 N. W. Rep. 102.

nection, it is only necessary to remark that the right of appeal must not be clogged with too burdensome or oppressive conditions, or else it will amount to a practical denial of the right of trial by jury, in contravention of the constitutional guaranty. If, for example, the condition is that the appellant shall enter into a recognizance, the amount demanded must not be excessive.¹¹⁸

§ 366. Evidence.

There can be no judgment of forfeiture of the liquors seized without proof of the allegations of the complaint.¹¹⁹ But it is enough for the prosecution to have made out a *prima facie* case, if there is no evidence in defense.¹²⁰ Taking up the several facts necessary to be established in order to make out a case, we find, in the first place, that the allegation of the place where the liquors are alleged to be kept, in the complaint, is a material and traversable allegation, and the claimant has a right to require proof of it, and to have the issue submitted to the jury.¹²¹ In the next place, it is necessary to show the intoxicating character of the liquor seized. But where the statute provides that all liquor shall be deemed intoxicating which contains more than a certain proportion of alcohol, it is only necessary to prove that the liquor seized is within the statute, not that it is actually intoxicating. Hence evidence is admissible to show the amount of alcohol contained in the liquor in controversy.¹²² The intoxicating properties of the article may also be proved by witnesses, relating their observation of its appearance, taste, and odor, the kind of vessels in which it was contained, the labels or marks on such vessels, the presence of men engaged in drinking, the presence of the paraphernalia of a bar-room, and other pertinent facts.¹²³ Next,

¹¹⁸ *In re Liquors of McSoley*, 15 R. I. 608, 10 Atl. Rep. 659.

¹¹⁹ *Comm. v. Intoxicating Liquors*, 113 Mass. 23.

¹²⁰ *State v. Intoxicating Liquors*, 58 Vt. 594, 4 Atl. Rep. 229.

¹²¹ *Comm. v. Intoxicating Liquors*, 117 Mass. 427. Where the sheriff testified that he searched the "American Hotel

premises," it was held that the jury had a right to understand that he searched the American Hotel premises in the town of B., which were described in the papers which he testified to having served. *State v. Liquor*, 38 Vt. 387.

¹²² *State v. McKenna*, 16 R. I. 398, 17 Atl. Rep. 51.

¹²³ *State v. Liquor*, 38 Vt. 387.

it is necessary to substantiate the allegation of an intent to sell contrary to law. And this,—since the proceeding is criminal in its nature,—must be proved beyond a reasonable doubt.¹²⁴ In relation to this fact, evidence is admissible of sales, made both before and after the seizure, of liquors of the same kind or of a different kind from those seized.¹²⁵ And so also is evidence admissible that packages, apparently of liquors, were received at the railroad station of the town, consigned to the person charged with keeping the liquors for sale, although there was no proof that they were actually delivered to him; a failure to prove that the packages contained intoxicating liquors would only go to the weight of the evidence.¹²⁶ The fact that “many people have been seen going to and coming from and waiting outside of the house for said B. to come, with bottles in their hands,” is a ground for issuing the warrant; but the mere fact that the place contains bottles partly full of liquor is not enough.¹²⁷ It must also be proved on the trial that the liquors were intended for sale in the city or town in which they were kept or deposited.¹²⁸ It will be sufficient to authorize a forfeiture of the liquors if it be shown that they were kept with intent to sell them contrary to law, although it is not alleged or proved by whom the intention was entertained. But the person charged as thus keeping liquors cannot be convicted unless it be alleged and proved that the liquors were *by him* unlawfully deposited, or intended for sale in violation of law.¹²⁹ The complaint may be maintained, though founded on evidence obtained by means of former proceedings, instituted for the purpose of gaining possession of the building in which the liq-

¹²⁴ Comm. v. Intoxicating Liquors, 115 Mass. 142.

¹²⁵ State v. Mead's Liquors, 46 Conn. 22.

¹²⁶ State v. Mead's Liquors, 46 Conn. 22.

¹²⁷ Comm. v. Intoxicating Liquors, 105 Mass. 595.

¹²⁸ State v. Gurney, 33 Me. 527; State v. Robinson, Id. 564.

¹²⁹ State v. Learned, 47 Me. 426. In an action for the forfeiture and seizure of certain intoxicating liquors, declara-

tions as to their ownership, made by a claimant in whose possession they were found, are admissible in evidence. *In re Horgan's Liquors*, 16 R. I. 542. 18 Atl. Rep. 279. When a prohibitory statute condemns premises used for the manufacture of liquor as a nuisance, and authorizes the seizure of all property found thereon, the question of the ownership of such property becomes immaterial. *Pearson v. International Distillery*, 72 Iowa, 348, 84 N. W. Rep. 1.

uors were kept, and without any actual knowledge on the part of the complainants in the former proceedings as to the liquors or the vessels containing them.¹³⁰ In proceedings under these statutes, it is also held that the original complaint and warrant are admissible in evidence.¹³¹ But when the warrant, besides directing the seizure of the liquors, authorizes the arrest of the keeper, when such liquors are found, the fact that the liquors have been found is to be proved by competent evidence under oath, and not by the return of the officer.¹³²

§ 367. Rights of Claimant.

If it is adjudged that the liquors were not liable to seizure and forfeiture, it is the right of the claimant to have them returned to him. And also, where the statute provides for a return of the liquors seized "if it is not proved" that they were kept for illegal sale, this is held to apply to cases where the proceedings are quashed for defects in matters of form.¹³³ It is not necessary that the claimant should set forth in his claim the person from whom, the place where, or the time when, the liquors were purchased by him. The fact of ownership constitutes the foundation of his claim, and the right to possession rests in such ownership, with no intention to keep or sell the same in violation of law.¹³⁴ A package of liquor sent "C. O. D.," and seized by an officer from the express company before delivery to the buyer, may be reclaimed by the buyer from the state, if not liable to confiscation, no other party making a claim.¹³⁵

¹³⁰ Comm. v. Intoxicating Liquors, 4 Allen, 593.

¹³¹ State v. Bartlett, 47 Me. 396.

¹³² State v. Stevens, 47 Me. 357.

¹³³ Comm. v. Intoxicating Liquors, 103 Mass. 454.

¹³⁴ State v. Intoxicating Liquors, 69 Me. 524.

¹³⁵ State v. Intoxicating Liquors, 73 Me. 278.

CHAPTER XVI.

CRIMINAL RESPONSIBILITY UNDER THE LIQUOR LAWS.

- § 368. Responsibility of Master for Acts of Servant or Agent.
- 369. Unauthorized Sales by Servant or Agent.
- 370. Statutory Liability for Unauthorized Sales.
- 371. Proof of Complicity of Master.
- 372. Personal Liability of Servant or Agent.
- 373. Several Liability of Master and Servant.
- 374. Responsibility of Husband for Sales by Wife.
- 375. Personal Liability of Wife.
- 376. Husband and Wife Jointly Liable.
- 377. Liability of Partners.
- 378. Joint Liability.
- 379. Sales by Children.
- 380. Persons Aiding and Abetting.
- 381. Purchaser not Guilty of an Offense.
- 382. Liability of Owner or Lessor of Premises.

§ 368. Responsibility of Master for Acts of Servant or Agent.

It is a recognized principle of criminal law that a master is responsible for the criminal acts of his servant or agent done within the scope of the latter's general employment, or in the course of the general business authorized by the master, unless shown to be done without the knowledge and consent, or against the orders, of the master; and that the master is answerable for such acts done by the servant or agent, whether in or out of his proper and usual employment, when done by the master's command, or with his knowledge and consent. Statutes enacted in various states, in relation to the liquor traffic, have modified this principle in such wise as to make the employer liable to criminal prosecution for the illegal acts of his servant or agent in certain cases where he would not have been liable at common law. But when such laws are not in force, or in cases to which they do not apply, the rule in prosecutions for illegally selling liquor, and similar offenses, is as above stated. Thus, in relation to acts done in the general scope of the servant's employment,

it is said, in Vermont, that in order to constitute one a dealer in spirituous liquors, so as to subject him to the penalty imposed by the statute in that behalf, it is not necessary that he should actually do the business in person, or even that it should be done in his presence, or by his express command. If he keeps liquors, and employs clerks to deal them out in common with other commodities, he is equally as liable for sales made by such clerks as if made by him in person.¹ But on the other hand, a principal is not liable for the sale of liquor on Sunday by an agent employed by him on week-days, without proof of knowledge by him of the unlawful acts charged on Sunday, and without proof of authority, express or implied, to act as agent on Sunday.² And so it is held that a master is not responsible for an illegal sale of liquor to a minor by his clerk under an honest mistake as to the buyer's age, if he directed him not to make such sales, though he may have authorized him to determine the age of customers from their appearance only.³ But if the whole course of the master's business is unlawful,—as if he keeps liquor for sale without a license,—he is responsible for any sales made by his clerks or servants, whether or not he knew of the particular sale or consented thereto, and no matter what his instructions to them may have been. For his employment of a person to aid or serve him in an illicit business is a direction or authority to that person to do the unlawful act

¹State v. Dow, 21 Vt. 484.

²State v. Burke, 15 R. I. 324, 4 Atl. Rep. 761. Compare Martin v. State, (Nebr.) 46 N. W. Rep. 621.

³Comm. v. Stevens, (Mass.) 26 N. E. Rep. 992. In this case it was said: "It does not appear to us necessary or reasonable to extend criminal responsibility for the act of a servant so far as to include a case like the present. The servant himself is no doubt responsible, because he has made a sale, however innocently, which the law forbade him to make. But if he reasonably and honestly believed the purchaser to be of adult age, and that the sale might lawfully be made, his statutory guilt should not be imputed to the defend-

ant. Though the defendant would have been responsible for his own mistake, if the sale to the minor had been made by him, it seems to us to be carrying the doctrine of criminal responsibility for the act of another quite too far to convict him by reason of an honest mistake on the part of his clerk, provided the jury should find that the master sincerely and honestly intended that his instructions should be followed in good faith, and that he was not negligent or careless in the selection of his clerks, or in the regulations and precautions which he prescribed for their guidance. See Mullins v. Collins, L. R. 9 Q. B. 292, per Quain, J., and also per Blackburn, J."

in his behalf.⁴ In the next place, if the servant or agent make a sale of liquor in violation of law by the direction of the principal, or with the *knowledge and consent* of the principal, the latter may be prosecuted and punished for the act.⁵ The mere fact that the principal was present when the sale was made would perhaps not be sufficient, of itself alone, to show conclusively his knowledge and consent. But it would authorize a presumption thereof. For he is supposed to be cognizant of what passes before him, and his omission to interfere, as master, and forbid the sale, is a species of tacit assent.⁶ Further, it is to be remarked that a general authority by an employer to his clerk to sell unlawfully will render him responsible criminally for any single sale made by the clerk in pursuance of such authority.⁷

§ 369. Unauthorized Sales by Servant or Agent.

At common law, and unless a different rule is established by the local statute, a master is not responsible criminally for a violation of the liquor laws committed by his clerk, servant, or agent, without his knowledge or consent, express or implied, or in his absence and in disregard of his commands or instructions.⁸ Hence, in a prosecution against the principal, where the evidence shows that the sale was made by an agent in charge of the establishment, it is competent for the defendant to rebut the presumption of authorization raised against him, by showing that the sale was in fact made with-

⁴Noecker v. People, 91 Ill. 494; State v. Keith, 37 Ark. 96; Johnson v. State, Id. 98; Lane v. State, Id. 272.

⁵State v. Skinner, 34 Kans. 256, 8 Pac. Rep. 420; State v. Wiggin, 20 N. H. 449; Zeigler v. Comm., (Pa. Sup.) 14 Atl. Rep. 237; Comm. v. Major, 6 Dana, 298.

⁶Johnson v. State, 83 Ga. 553, 10 S. E. Rep. 207; Hofner v. State, 94 Ind. 84; Forrester v. State, 63 Ga. 349.

⁷Kinnebrew v. State, 80 Ga. 232, 5 S. E. Rep. 56.

⁸Comm. v. Putnam, 4 Gray, 16; Johnson v. State, 83 Ga. 553, 10 S. E. Rep. 207; Hipp v. State, 5 Blackf. 149; Wetz-

ler v. State, 18 Ind. 35; Lauer v. State, 24 Ind. 131; O'Leary v. State, 44 Ind. 91; Hanson v. State, 43 Ind. 550; Thompson v. State, 45 Ind. 495; Lathrope v. State, 51 Ind. 192; State v. Hayes, 67 Iowa, 27, 24 N. W. Rep. 574; State v. McGrath, 73 Mo. 181; State v. Reiley, 75 Mo. 521; State v. Shortell, 93 Mo. 123, 5 S. W. Rep. 691; People v. Parks, 49 Mich. 333, 13 N. W. Rep. 618; People v. Hughes, (Mich.) 48 N. W. Rep. 945; Gaiocchio v. State, 9 Tex. App. 387. Compare Dudley v. Sautbigne, 49 Iowa, 650; People v. Blake, 52 Mich. 566, 18 N. W. Rep. 360; People v. Roby, 52 Mich. 577, 18 N. W. Rep. 365, 50 Am. Rep. 270.

out his authority and against his directions.⁹ But where the defense is that the agent violated a direction or instruction requiring him not to make such sales, it must be shown that the order was given honestly and in good faith, and with the intention and expectation that it would be obeyed; and the question, whether or not the order was so given, is for the jury to determine.¹⁰ It is also a good defense to such a prosecution that the person who made the sale was not the clerk or agent of the defendant, or that he was acting beyond the terms of his general authority. Thus, it may be shown that the seller was not a clerk or bar-tender but a mere porter or menial servant, who thus acted beyond the scope of his employment and in disobedience of the proprietor's orders.¹¹ On the same principle, a criminal prosecution for unlawfully selling liquor after eleven o'clock at night, (that being forbidden by statute,) cannot be maintained on proof of a sale by a servant of defendant, without his leave and against his orders.¹²

§ 370. Statutory Liability for Unauthorized Sales.

It has been already mentioned that statutes enacted in several of the states have modified the common law rule as to the criminal responsibility of a master for the acts of his servant or agent, so as to make him answerable in cases where he could not be held to liability without such statutory provisions. Under these laws, it is held to be no defense to an indictment against the principal that the unlaw-

⁹ *Anderson v. State*, 22 Ohio St. 305; *Kirkwood v. Autenreith*, 21 Mo. App. 73.

¹⁰ *Comm. v. Rooks*, 150 Mass. 59, 22 N. E. Rep. 436; *Comm. v. Stevens*, (Mass.) 26 N. E. Rep. 992; *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688.

¹¹ *Minden v. Silverstein*, 36 La. Ann. 912.

¹² *Comm. v. Wachendorf*, 141 Mass. 270, 4 N. E. Rep. 817. In this case, the prosecution was brought under a law that "no person shall sell . . . intoxicating liquors except as authorized in this chapter." The court said that

they could not infer that the legislature meant to include such a case as the present in this language. In cases where the master has been held responsible for the acts of the servant in disobedience of his orders, it has been under language much broader than this; *e. g.*, "no sale of intoxicating liquors shall be made," etc., or "no licensee shall maintain, or permit to be maintained, any screen," etc. But it seems that a sufficient ground for the decision would be that the servant here was acting outside the scope of his duties under his general employment.

ful act was done without his knowledge or consent, or without his authority, or in his absence, or even that it was done in contravention of his express and *bona fide* orders.¹³ This rule is applied, for example, under a statute providing that any unlawful sale of liquor to a minor, by a clerk or other person acting for a dram-shop keeper, shall be deemed the act of the keeper himself.¹⁴ So under a statute which imposes a penalty upon any person who shall sell by himself or another.¹⁵ The same is the case under a statute providing that "no person or persons, by himself or another, shall sell, or cause to be sold, or furnished, or permit any other person or persons in his employ" to sell intoxicating liquors to minors.¹⁶ And so under a statute subjecting to its penalty "any person who may own or have any interest in . . . liquor sold contrary to this act."¹⁷ And under laws of this kind, an allegation in the indictment that the liquor was sold by the defendant is sustained by proof that it was sold by his bar-keeper, and it is immaterial that the latter acted in violation of his instructions.¹⁸ The object of these statutory provisions, in effect, is to require the principal to see to it, at his peril, that no unlawful sales are made in his establishment. And if it savors of severity to subject him to punishment for the acts of others which he had expressly forbidden, it must be remembered that he can escape liability by selecting servants and agents who will keep within the law and obey his orders, or by abandoning a business which exposes him to such hazards.

§ 371. Proof of Complicity of Master.

Where the evidence shows that the alleged unlawful sale of liquor was made in the defendant's shop or place of business by his servant

¹³ Carroll v. State, 63 Md. 551, 3 Atl. Rep. 29; Boatright v. State, 77 Ga. 717; Riley v. State, 43 Miss. 397; Gathings v. State, 44 Miss. 343; McCutcheon v. People, 69 Ill. 601; State v. Durkem, 23 Mo. App. 387; Greene County v. Wilhite, 29 Mo. App. 459.

¹⁴ State v. McGinnis, 38 Mo. App. 15.

¹⁵ Cloud v. State, 36 Ark. 151; State

v. Denoon, 81 W. Va. 122, 5 S. E. Rep. 815.

¹⁶ Snider v. State, 81 Ga. 753, 7 S. E. Rep. 631; Loeb v. State, 75 Ga. 258.

¹⁷ Fahey v. State, 62 Miss. 402; Teasdale v. State, (Miss.) 3 South. Rep. 245; Mogler v. State, 47 Ark. 109, 14 S. W. Rep. 473.

¹⁸ Draper v. Fitzgerald, 30 Mo. App. 518.

or agent, this raises a presumption that the defendant authorized the sale, or knew of it and consented to it.¹⁹ Hence an instruction that "nothing to the contrary appearing, evidence of a sale by a servant in his master's shop of his master's goods there kept for sale would, if believed, warrant the jury in finding the sale was authorized by the master, and this would be so although the defendant was not on the premises at the time the sale was made," is not erroneous.²⁰ Such evidence having been given, it then becomes incumbent upon the principal to show that the sale was made, not only without his knowledge, but also without his consent, express or implied, in order to shield himself from punishment.²¹ And in rebuttal of his contention in that behalf, it is proper for the prosecution to show his presence at the time the sale was made, not as conclusively establishing his complicity, but as a fact from which the jury may infer his knowledge and consent. Thus, in a prosecution for keeping a saloon open on a holiday, if there is testimony tending to show that the saloon was open, that defendant was the proprietor of it, and that he was about the building at the time, although a bar-keeper was in charge, there is enough to go to a jury.²² And all that is necessary to be proven is the knowledge and consent of the defendant in the particular instance in controversy, and the state cannot be required to show his knowledge of and consent to the general violation of the law by the servant or agent.²³ And conversely, evidence of previous general instructions by defendant to his servant not to dispense

¹⁹ *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688; *Comm. v. Nichols*, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; *Comm. v. Perry*, 148 Mass. 160, 19 N. E. Rep. 212; *Fullwood v. State*, 67 Miss. 554, 7 South. Rep. 432; *Molihan v. State*, 30 Ind. 266. Compare *Comm. v. Briant*, 142 Mass. 463, 8 N. E. Rep. 338; *Comm. v. Stevenson*, 142 Mass. 466, 8 N. E. Rep. 341. In *State v. Mahoney*, 23 Minn. 181, it was said that a single sale of liquor to an habitual drunkard, made by a clerk of defendant in his absence, is not sufficient to raise a presumption of an authority, from the defendant to the clerk, to make the sale.

The presumption from a clerk being employed at the saloon would be that he had authority from the defendant to make such sales as were lawful.

²⁰ *Comm. v. Houle*, 147 Mass. 380, 17 N. E. Rep. 896.

²¹ *Klug v. State*, 77 Ga. 734. Compare *Comm. v. Hayes*, 145 Mass. 289, 14 N. E. Rep. 151. And see *People v. Utter*, 44 Barb. 170.

²² *People v. Baumann*, 52 Mich. 584, 18 N. W. Rep. 369; *Comm. v. Rooks*, 150 Mass. 59, 22 N. E. Rep. 436.

²³ *Comm. v. Rooks*, 150 Mass. 59, 22 N. E. Rep. 436.

liquor unlawfully is immaterial, where it is admitted, or conclusively appears, that the particular sale charged was made with his knowledge and approval.²⁴ Whether the facts show knowledge on the part of the owner, of sales made by his clerk or bar-keeper, is a question alone for the jury.²⁵ But as the defendant would not be responsible for the acts of a person not in his employment, or not connected with his business, or having no authority from him, it is necessary to produce evidence to show the relation of master and servant, or that of principal and agent, between the defendant and the salesman. And it has been ruled that where the testimony merely shows that the liquor was sold in a saloon of which defendant was the proprietor, and that the sale was made by a person who was at the time behind the bar or counter, acting as bar-keeper, but does not show that such person was the agent or employe of defendant, or that the defendant was present or had any knowledge of the sale, the guilt of the defendant is not established.²⁶ A conviction for keeping a liquor nuisance cannot be sustained on evidence that, in the absence of the defendant, a single sale of liquor was made on Sunday by a woman who was washing the floor of the saloon, there being no evidence that she was employed otherwise than as a char-woman, except that she was apparently the only one in charge of the premises at the time.²⁷

§ 372. Personal Liability of Servant or Agent.

In prosecutions under the liquor laws, the question of the personal responsibility of a clerk or servant frequently arises in connection with sales made without the necessary license. And it appears that the following propositions may be deduced from the authorities. First, if the employer has a license, it is not necessary that the clerk or agent should be licensed, provided the sale was not otherwise unlawful; for the master's license protects the servant. That is, one who, as clerk or servant of another, sells liquor for the sale of which

²⁴ *State v. Mueller*, 38 Minn. 497, 38 N. W. Rep. 691. *Wreidt v. State*, 48 Ind. 579. Compare *State v. Brown*, 31 Me. 520.

²⁵ *Neideiser v. State*, 6 Baxt. 499.

²⁷ *Comm. v. Hagau*, (Mass.) 26 N. E.

²⁶ *Anderson v. State*, 39 Ind. 553; *Rep. 95*.

his employer is duly licensed, cannot be prosecuted for selling without himself having a license.²⁸ Secondly, if the person who makes the sale holds a license, he cannot be indicted for an unlawful sale, although he acted only as the agent of another person, who owned the liquors, and who was not licensed. That is, a licensed dealer may sell his own or any other person's liquor without offense.²⁹ Thirdly, if neither the principal nor the agent, master nor servant, holds a license, the agent or servant is personally punishable for making the unlawful sale. That is, in such a prosecution, no license being shown in any one, it is no defense that the person indicted acted merely as the agent or employe of another.³⁰ The ground of this rule is stated by the supreme court of Vermont as follows: "It is claimed that if the respondent, in making the sale, acted gratuitously as the mere servant of H., he would not be personally liable to indictment, though H. had no license. But we think this is not sound. If the respondent justify the act of selling under H. as his principal, he must show an authority in his principal to sell. The agent who does the act can stand in no better situation than his principal. He justifies under him, and if the principal had no authority to sell, the agent could have none."³¹ Further, as the statutes are framed, the intention, motives, or knowledge of the defendant do not enter into the case at all. One who enters the employment of a liquor-dealer as a clerk, agent, or bar-keeper, must ascertain for himself, at his own peril, whether the dealer has a license or not. If in fact there is no such

²⁸ *State v. Hunt*, 29 Kans. 762; *State v. Keith*, 37 Ark. 96; *Johnson v. State*, Id. 98; *Lane v. State*, Id. 272. But in such case, the burden is on defendant to show as a defense that he acted, in making the sale, as the agent of a licensed dealer. *Rana v. State*, 51 Ark. 481, 11 S. W. Rep. 692.

²⁹ *State v. Keith*, 37 Ark. 96; *Johnson v. State*, Id. 98.

³⁰ *Wason v. Underhill*, 2 N. H. 505; *State v. Bugbee*, 22 Vt. 32; *Comm. v. Hadley*, 11 Metc. (Mass.) 66; *Comm'rs of Excise v. Dougherty*, 55 Barb. 382; *Abel v. State*, (Ala.) 8 South. Rep. 760; *Davidson v. State*, 27 Tex. App. 263, 11

S. W. Rep. 371; *Baird v. State*, 52 Ark. 326, 12 S. W. Rep. 566; *Rana v. State*, 51 Ark. 481, 11 S. W. Rep. 692; *Berning v. State*, 51 Ark. 550, 11 S. W. Rep. 882; *State v. Keith*, 37 Ark. 96; *State v. Deevers*, 38 Ark. 517; *Cloud v. State*, 36 Ark. 151; *State v. Kriechbaum*, (Iowa,) 47 N. W. Rep. 872; *Hays v. State*, 13 Mo. 246; *State v. Bryant*, 14 Mo. 340; *People v. Drennan*, (Mich.) 49 N. W. Rep. 215; *State v. Chastain*, 19 Oreg. 176, 23 Pac. Rep. 968; 2 Wharton, *Crim. Law*, § 1504; *Bishop, Stat. Crimes*, § 1024.

³¹ *State v. Bugbee*, 22 Vt. 32.

license, the salesman is guilty, irrespective of his actual state of knowledge.³² One who is liable as agent for selling without license, under a statute providing that all persons violating the act, whether as owner, or as clerk, agent, servant, or employe, shall be equally liable as principals, need not be indicted as agent, but may be simply as principal.³³

There are also numerous cases which hold that in prosecutions for other violations of the liquor laws, besides the offense of selling without license, it is not a valid defense that the prisoner acted merely as the servant or agent of another.³⁴ But the better doctrine seems to require a limitation of this rule to three specific cases; viz., (1) where the defendant acted in disobedience of orders, or in the absence of his principal, and without the knowledge and consent of the latter, so that the principal would not be also liable for the same single act; (2) where the gist of the offense is the act or conduct of the defendant, without reference to the ownership of the property; (3) where the offense complained of is one which may be participated in or contributed to by several persons, as where one opens or maintains a saloon as proprietor and another dispenses liquor therein; in such cases, both master and servant may be indictable. In accordance with these principles it is held that where the servant acts under the control and direction or in the presence of his employer, he is not personally answerable for the unlawful act.³⁵ But a servant may be convicted of keeping and maintaining a saloon if, in the absence of the proprietor, he makes illegal sales

³² *State v. Chastain*, 19 Oreg. 176, 23 Pac. Rep. 963. In this case it was said: "As statutes of this character bind the party to know the facts and to keep them at his peril, neither the motives nor the intent of the defendant can relieve him, when a sale is made without a license. The intent is immaterial when the statute makes the act indictable irrespective of guilty knowledge; and in such case ignorance of fact, no matter how sincere, can be no defense. It is enough that under the statute the commission of the act prohibited con-

stitutes the offense, irrespective of the motives or knowledge of the defendant, and as his principal had no license to sell, the defendant must stand for him, so far as appertains to this prosecution."

³³ *People v. Soule*, 74 Mich. 250, 41 N. W. Rep. 908.

³⁴ *Marshall v. State*, 49 Ala. 21; *Comm. v. Brown*, (Mass.) 27 N. E. Rep. 776; *State v. Finan*, 10 Iowa, 19; *Roberts v. O'Connor*, 33 Me. 496.

³⁵ *Comm. v. Galligan*, 144 Mass. 171, 10 N. E. Rep. 788.

of liquor, or otherwise assumes a temporary control of the premises.³⁶ So an indictment for keeping spirituous liquor for sale may be maintained against one employed as bar-keeper by the owner of a saloon where liquor is kept for sale. "It is settled in this state," says the court in New Hampshire, "that an indictment for keeping a nuisance respects not the ownership, but the criminal management, of the property complained of, and where there is evidence tending to implicate the defendant, it is immaterial whether he acted as principal, or as the servant or agent and by the command of another."³⁷ Assuming, without authority, to act as agent for the owner, does not exonerate one from criminal responsibility for selling liquor; but merely acting as messenger, and transmitting the liquor from the seller to the buyer, and the money from the buyer to the seller, does not render one criminally responsible.³⁸

In some states, the liability of servants or agents is not determined solely on common law principles, but is materially affected by the statutes. Thus, in Maine, an act declares that any clerk, agent, or other person in the employment or on the premises of another, who violates, or in any manner aids or assists in violating, any act relating to intoxicating liquors, is equally guilty with the principal, and shall suffer like penalties. Under this statute, it is held that one who participates in the commission of the misdemeanor of keeping a liquor nuisance, to such an extent as to render himself criminally liable at all, is liable as a principal, and may be indicted, convicted, and punished as such, although the capacity in which he acted was that of a clerk, agent, or servant merely.³⁹ So a clerk in the establishment of a liquor dealer is included in a statute rendering liable to a penalty "any person or firm who shall sell, or be in any wise concerned in selling, spirituous liquors."⁴⁰ But any exception in the statute in favor of the master will operate equally to the ben-

³⁶ *Comm. v. Brady*, 147 Mass. 583, 18 N. E. Rep. 568; *Comm. v. Sinclair*, 138 Mass. 493.

³⁷ *State v. McGuire*, 64 N. H. 529, 15 Atl. Rep. 213, citing *State v. McGregor*, 41 N. H. 407. And see *State v. Sullivan*, 83 Me. 417, 22 Atl. Rep. 381.

³⁸ *Comm. v. Williams*, 4 Allen, 587.

³⁹ *State v. Sullivan*, 83 Me. 417, 22 Atl. Rep. 381. See, also, *State v. Stucker*, 33 Iowa, 395.

⁴⁰ *Tardiff v. State*, 23 Tex. 169.

efit of the employe. Thus, if the law exempts from its provisions "sales of cider by the makers thereof," this extends to sales by the makers through their servants or agents, and protects the servant as well as the master.⁴¹

§ 373. Several Liability of Master and Servant.

We have already mentioned that, in certain cases of violations of the liquor law, both the proprietor or master and the clerk or servant may be criminally responsible, and both may be indicted and punished.⁴² Thus, in relation to the offense of keeping open a liquor-saloon on a day when the statute requires it to be closed, it is held that although, for keeping open one saloon there can be but one offense on one day, yet bar-tenders who were present and selling under the direction of the proprietor, are equally guilty with the latter, and his conviction and punishment will be no bar to their conviction.⁴³

⁴¹Comm. v. Mahoney, (Mass.) 25 N. E. Rep. 833.

⁴²See Thompson v. State, 5 Humph. 138; French v. People, 3 Park. Crim. 114.

⁴³People v. Ackerman, 80 Mich. 588, 45 N. W. Rep. 367. "It is urged," said the court in this case, "that the reasonable construction of the statute is that either the agent or the proprietor may be convicted of and punished for the offense, but that when one of them is so convicted and punished it is a bar to the conviction of the other. We do not think so. All engaged in the selling of liquor in an open saloon on an interdicted day are made principals by the law, and the courts are not concerned with, and will not inquire into, the question of principal or agent, and all may be punished for the violation of the statute if proceeded against and convicted. Nor will it matter who opened the door. Those who are selling behind the bar, or waiting upon customers in any part of the saloon, are equally guilty of keeping it open.

There is no injustice in this holding. The respondent was not obliged to be in the saloon on that day, and must be considered to have known the law, and that his acts were unlawful. As the law also punishes the proprietor for the acts of his clerk or agent, it is suggested that under this interpretation of the statute Huber might be convicted and punished for the act of each of his three bar-tenders on this day and his own act, and thereby be punished four times for the same offense upon one day. This is not so. Huber can only be convicted and punished once for keeping his saloon open on the 30th of April, 1889, or any other legal holiday. One conviction would be a bar to any other for the same offense upon the same day. But this does not preclude the arrest and conviction of each of his three clerks for the same offense,—for a transaction in which they aided, and are made principals by the statute. Any number of persons concerned therein may be convicted of the same offense, if their acts in law make them

So where a master intrusts to a servant the management and control of his business of selling liquor, and he carries it on in the absence of his employer, both may be convicted of keeping and maintaining the tenement.⁴⁴ An agent having the actual possession of intoxicating liquors, and participating in the unlawful purpose of sale, is equally guilty with his principal.⁴⁵

§ 374. Responsibility of Husband for Sales by Wife.

In accordance with the well-settled principles of the criminal law, it is held that a husband is answerable for illegal sales, or other infractions of the liquor law, made by his wife in his presence, or by his command, or with his knowledge and consent, or when she acts as his agent or servant.⁴⁶ The law presumes that what the wife does in the husband's presence she does under his influence and coercion. But when he is not present, no such presumption arises. And therefore he cannot be convicted for illegal acts of selling, done by the wife in his absence, unless it is shown, to the satisfaction of the jury, that such acts were done by his command or authority.⁴⁷ If the husband is near enough for the wife to act under his immediate influence and control, though not in the same room, he is not absent, within the meaning of the law.⁴⁸ But the fact that, at the time of an unlawful sale of intoxicating liquor by a married woman, her husband was lying sick upon a bed in a room adjoining that in which the sale took place, the door between the rooms being open, does not raise a conclusive presumption of law that she was acting under his coercion.⁴⁹ If a married woman keeps intoxicating liquors for sale in violation of law, in a house owned or hired by her, or owned by them jointly, and her husband aids her in such keeping and selling,

principals, and the conviction of one is no bar to the conviction of the others." And see *Janks v. State*, (Tex. App.) 15 S. W. Rep. 815.

⁴⁴ *Comm. v. Merriam*, 148 Mass. 425, 19 N. E. Rep. 405.

⁴⁵ *Menken v. Atlanta*, 78 Ga. 668, 2 S. E. Rep. 559.

⁴⁶ *Comm. v. Reynolds*, 114 Mass. 306;

Comm. v. Barry, 115 Mass. 146; *Geuing v. State*, 1 McCord, 573.

⁴⁷ *Seibert v. State*, 40 Ala. 60; *State v. Baker*, 71 Mo. 475. See *Comm. v. Coughlin*, 14 Gray, 389.

⁴⁸ *Comm. v. Flaherty*, 140 Mass. 454, 5 N. E. Rep. 258.

⁴⁹ *Comm. v. Gormley*, 133 Mass. 580.

or if, without actually and actively aiding her, he is present, and has knowledge of the fact and of her intent, the presumption of law is that she is acting under his coercion, and he can be convicted of such illegal keeping, though he has no interest in the stock or profits.⁵⁰ And a husband, with guilty knowledge thereof, is liable for his wife's illegal keeping of liquors, although she has filed a certificate for doing business on her own account and holds a government license as a retail liquor-dealer.⁵¹ It has also been held that the husband is liable to be indicted and convicted, although he was not present at the sale, and although he had often remonstrated with the wife for selling liquor.⁵² But the best recent cases favor the doctrine that a husband cannot be convicted of maintaining a liquor nuisance where it appears that the house was owned by his wife, who used it for such unlawful purpose of her own free will, without his consent, even though it does not appear that he has used all reasonable and practicable means to control her conduct; and evidence that from time to time, during several years next preceding the date laid in the indictment, he had used such means, is admissible, as showing the state of his mind at the period alleged in the indictment.⁵³ The supreme judicial court of Massachusetts, in the case cited, took occasion to say: "We are aware that in some of the decisions expressions have been used which indicate that it is a substantive part of the law that, to excuse himself, the husband must show that he has used all reasonable and practicable means to restrain his wife; but, taking all the decisions together, we think it appears that his whole conduct, including what he did and said, as well as what he could reasonably have done and did not do, is admitted as evidence only for the purpose of proving or disproving his consent in fact to the acts done by his wife." In a prosecution for maintaining a liquor nuisance, where the evidence showed that all purchases of liquor had been made from defendant's wife at his tenement, and defendant testified that if any sales of liquor were made by his wife it was

⁵⁰ Comm. v. Pratt, 126 Mass. 462; Comm. v. Carroll, 124 Mass. 30; Comm. v. Kennedy, 119 Mass. 211; Faircloth v. State, 73 Ga. 426.

⁵¹ Comm. v. Barry, 115 Mass. 146.

⁵² State v. McDaniel, 1 Houst. Crim. (Del.) 506.

⁵³ Comm. v. Hill, 145 Mass. 305, 14 N. E. Rep. 124.

without his knowledge or consent, it was held that, if the jury disbelieved him, the fact that he and his wife lived together in such tenement was competent evidence that she acted as his agent.⁵⁴

§ 375. Personal Liability of Wife.

If a married woman commits an offense against the liquor laws, of her own free will, not in the presence of her husband, and independent of any coercion or control by him, she herself is criminally responsible, and he is not.⁵⁵ And it is no defense to an indictment of a wife for being a common seller of intoxicating liquor, that her husband provided it and she unlawfully sold it, if she was not acting under his coercion or influence.⁵⁶ And on a similar principle, a *feme covert*, who is a sole trader, is liable to the penalty for illegally selling liquor, although the liquor is handed to the purchaser by her husband, she being present, and he acting as her clerk.⁵⁷

§ 376. Husband and Wife Jointly Liable.

There are certain cases in which the criminality of an offense against the liquor laws may be shared by husband and wife, so that both may be amenable to the penalty prescribed. Thus, a husband and wife may be jointly indicted for keeping and maintaining a liquor nuisance, and upon sufficient evidence, both may be convicted.⁵⁸ So also, it has been held that a husband and wife may be jointly indicted for a single act of retailing liquor unlawfully; and in such a case, if they are convicted, a fine must be assessed, and a judgment rendered, against each separately.⁵⁹

⁵⁴ Comm. v. Hyland, (Mass.) 28 N. E. Rep. 1055.

⁵⁵ State v. Haines, 35 N. H. 207; Comm. v. Murphy, 2 Gray, 510; Comm. v. Burk, 11 Gray, 437; Comm. v. Daley, 148 Mass. 11, 18 N. E. Rep. 579; Pennybaker v. State, 2 Blackf. 484.

⁵⁶ Comm. v. Welch, 97 Mass. 593.

⁵⁷ City Council v. Van Roven, 2 McCord, 465.

⁵⁸ Comm. v. Tryon, 99 Mass. 442.

⁵⁹ Comm. v. Hamor, 8 Gratt. 698.

§ 377. Liability of Partners.

At common law, if one partner in a firm sells intoxicating liquor unlawfully, in the absence of his co-partner and without his knowledge or consent, the latter is not liable to be indicted therefor.⁶⁰ But this rule has been modified by statute in several of the states. Thus, in Mississippi, it is said that, under the laws there in force, one partner can be convicted upon a sale of liquor by his associate without his consent and in his absence.⁶¹ And in Arkansas, under a statute providing that any one who shall sell "or be interested in the sale" of liquors to a minor shall be guilty of a misdemeanor it is held that a person who is a partner in a saloon may be convicted for a sale by his co-partner, although the defendant was absent at the time and had no knowledge of it.⁶² And if one of two partners sells liquor unlawfully for account of the firm, and with the consent of the other partner, such other is liable.⁶³ So also, an indictment for selling liquor to a minor will lie against two partners, where one, in the presence of the other, or a clerk, in the presence of and with the consent of both, makes the sale.⁶⁴

§ 378. Joint Liability.

Two persons may be jointly indicted for selling liquor contrary to the statute, or for maintaining a liquor nuisance, or for any similar offense against these laws, and under such an indictment, one defendant may be convicted, although no case is made against the other.⁶⁵

⁶⁰ *Acree v. Comm.*, 13 Bush, 353.

⁶¹ *Whitton v. State*, 37 Miss. 379.

⁶² *Robinson v. State*, 38 Ark. 641;
Waller v. State, Id. 656.

⁶³ *State v. Neal*, 27 N. H. 181.

⁶⁴ *State v. Scoggins*, 107 N. Car. 859,
12 S. E. Rep. 59.

⁶⁵ *State v. Simmons*, 66 N. Car. 622;
State v. Sterns, 28 Kans. 154; *State v. Wadsworth*, 30 Conn. 55; *Tracy v. Perry*, 5 N. H. 504. In Missouri, it is said that persons should not be jointly

indicted for selling liquor without license, in the absence of proof showing a common design or concert of action. Where, however, notwithstanding the failure of such proof, it appears clearly that each of a number of defendants so jointly indicted is guilty of acts which would warrant a separate indictment and conviction, the misjoinder does not work such "prejudice to the substantial rights of defendant upon the merits," (as provided in the

Nor is it necessary, to sustain a joint indictment, that the two defendants should have participated in the unlawful act in the same manner or to the same degree. For here the principle applies that in misdemeanors there are no accessories, but all who are criminally connected with the wrongful act are principals. Hence, for example, the person who procures the liquor and offers it for sale, and he who actually dispenses it to the purchaser, may be jointly guilty and jointly indicted and convicted.⁶⁶ But in this connection it is important not to lose sight of the rules governing the relation of master and servant, already explained. Thus, in a prosecution against A. and B. for maintaining a liquor nuisance, the court instructed the jury that if B. assisted A. in keeping and maintaining the premises as a nuisance, he would be liable to conviction. But this was held erroneous, as the jury might fairly have understood that they were instructed to convict B. although they should find that A. was the sole proprietor, and B.'s assistance was only that of a servant, rendered in A.'s presence.⁶⁷ And so, in a similar case, an instruction that if one of the defendants was the sole proprietor, and the other was present, aiding and abetting him "in acts of proprietorship and control," both may be found guilty, is objectionable, as too indefinite and as tending to mislead the jury.⁶⁸ It is also held that two or more persons acting in concert in unlawful measures to secure the enforcement of the liquor law,—as, by using artifice or persuasion to induce a tavern-keeper to furnish liquor on Sunday,—are guilty of a conspiracy.⁶⁹

§ 379. Sales by Children.

A few cases have been reported in the books, involving the question of the criminal responsibility of infants under the liquor laws. But these cases have not departed from the common-law principles applicable to the subject, but have recognized the familiar rule which fixes the age of fourteen years as the dividing line with reference to

statute.) as to warrant the interference of the supreme court. *State v. Edwards*, 60 Mo. 490.

⁶⁶ *State v. Caswell*, 2 Humph. 399.

⁶⁷ *Comm. v. Murphy*, 145 Mass. 250, 13 N. E. Rep. 892.

⁶⁸ *Comm. v. Galligan*, 144 Mass. 171, 10 N. E. Rep. 788.

⁶⁹ *Comm. v. Leeds*, 9 Phila. 569.

the presumption of legal capacity for crime. Thus, it is held that if unauthorized sales of liquor are proven to have been made by a child under the age of fourteen years, in the presence of its mother and in obedience to her directions, it is necessary, in support of an indictment against the child for making such sales, to establish, as a distinct fact, its legal capacity to commit a crime.⁷⁰ But on the other hand, it is no defense to such an indictment that the defendant was a minor about seventeen years of age, and was selling under the instruction of another and as his servant or agent, without compensation, unless the defendant succeeds in proving that he was legally incapable of committing crime, or was acting under duress.⁷¹

§ 380. Persons Aiding and Abetting.

As a general principle, a person who aids and abets, or who counsels or procures, an unlawful sale of intoxicating liquors, is liable to punishment, and may be indicted as a principal in the transaction.⁷² For example, one who is employed in making change for parties engaged in unlawfully selling liquor to minors may be convicted, on an indictment for selling the liquors, as aiding and assisting in the act.⁷³ So, where an adult and a minor go together to a saloon, and the adult, with the money of the minor, purchases liquor for him, he is not only an agent of the minor for the purchase (which would not be punishable,) but he is also an aider and procurer of the sale, and therefore punishable as a principal in violating the statute prohibiting sales to minors.⁷⁴ In misdemeanors, it will be remembered, all persons who procure, participate in, or assent to the commission of a crime are regarded as principals and indictable as such.

§ 381. Purchaser not Guilty of an Offense.

So far as we have been able to discover, there is but a single reported decision in which it has been held that the purchaser of

⁷⁰ Comm. v. Mead, 10 Allen, 398.

⁷³ Johnson v. People, 83 Ill. 431.

⁷¹ Cagle v. State, 87 Ala. 38, 93, 6 South. Rep. 300.

⁷⁴ Foster v. State, 45 Ark. 361. See also, Cagle v. State, 87 Ala. 38, 93, 6 South. Rep. 300.

⁷² State v. Shenkle, 36 Kans. 43, 12 Pac. Rep. 309.

liquor, which is sold in violation of law, is guilty of an offense against the statute.⁷⁵ On the contrary, many cases support the doctrine that the purchaser, although he knows that the circumstances will render the sale illegal, is not guilty of any offense, by soliciting the seller to violate the law, or by aiding and abetting the crime, to the mere extent of buying the liquor, unless the statute expressly prescribes a punishment for him; that he is not criminating himself in testifying to the sale; and that his testimony is not to be regarded as that of an accomplice.⁷⁶ On this point, the court in Massachusetts has spoken as follows: "The court are of opinion that the witness would not be liable to any prosecution as such purchaser, and therefore would not criminate himself or expose himself to punishment by such a purchase. No precedent and no authority has been shown for such a prosecution, and no such prosecution has been attempted within the knowledge of the court, although a similar law has been in force almost from the foundation of the government, and thousands of prosecutions and convictions of sellers have been had under it, most of which have been sustained by the testimony of buyers. That such a prosecution is unprecedented shows very strongly what has been understood to be the law upon this subject. It is difficult to draw any precise line of distinction between the cases in which the law holds it a misdemeanor to counsel, entice, or induce another to commit a crime, and where it does not. In general, it has been considered as applying to cases of felony, though it has been held that it does not depend upon the mere legal and technical distinction between felony and misdemeanor. One consideration, however, is manifest in all the cases, and that is, that the offense proposed to be committed, by the counsel, advice, or enticement of another, is of a high and aggravated character, tending to breaches of the peace or other great disorder and violence, being what are usually considered *mala in se*, or criminal in themselves, in contradistinction to *mala prohibita*, or acts otherwise

⁷⁵ State v. Bonner, 2 Head, 135. But compare the later case of Harney v. State, 8 Lea, 113.

⁷⁶ State v. Rand, 51 N. H. 361; Comm. v. Willard, 22 Pick. 476; State v. Teahan, 50 Conn. 92; Harrington v. State,

36 Ala. 236; State v. Miller, 26 W. Va. 106; Harney v. State, 8 Lea, 113; Wake-man v. Chambers, 69 Iowa, 169, 28 N. W. Rep. 498; State v. Baden, 37 Minn. 212, 34 N. W. Rep. 24.

indifferent than as they are restrained by positive law. All the cases cited in support of the objection of the witness are of this description. . . . There is another view of the subject, which we think has an important bearing on the question, if it is not indeed decisive. The statute imposes a penalty upon any person who shall sell. But every sale implies a purchaser; there must be a purchaser as well as a seller, and this must have been known and understood by the legislature. Now, if it were intended that the purchaser should be subject to any penalty, it is to be presumed that it would have been declared in the statute, either by imposing a penalty on the buyer in terms, or by extending the penal consequences of the prohibited act to all persons aiding, counseling, or encouraging the principal offender. There being no such provision in the statute, there is a strong implication that none such was intended by the legislature."⁷⁷ By an extension of this principle, it is held that one who has no interest in the liquor sold or in the money paid for it, and who acts merely as the agent or friend of the buyer, does not violate the statute against liquor-selling.⁷⁸

§ 382. Liability of Owner or Lessor of Premises.

Unless the statute expressly declares the contrary, the owner of premises upon which liquor is unlawfully kept for sale is not guilty of an offense, if he leased the premises for a lawful purpose and did not affirmatively assent to such unlawful use, and he is not bound to interfere and invoke the law, when he subsequently finds that the tenant is making such unlawful use of the premises; for the mere failure to prevent, or attempt to prevent, the illegal keeping or sale of liquor, does not subject him to the penalties of the statute.⁷⁹ But in several of the states, the statutes are such as to impose a responsibility upon the landlord, when the tenant unlawfully keeps or sells liquor, if he leased the premises for that purpose, or if, with knowledge of the fact, he authorizes, suffers, or permits the unlawful acts

⁷⁷ Comm. v. Willard, 22 Pick. 476, per Shaw, C. J.

⁷⁸ Campbell v. State, 79 Ala. 271; Morgan v. State, 81 Ala. 72, 1 South. Rep. 472. Compare Foster v. State, 45 Ark.

361. And see Berger v. State, 50 Ark 20, 6 S. W. Rep. 15.

⁷⁹ State v. Ballingall, 42 Iowa, 87 Crocker v. State, 49 Ark. 60, 4 S. W. Rep. 197.

of the tenant.⁸⁰ In regard to bringing home such knowledge to the lessor, it is said that knowledge sufficient to excite the suspicions of a prudent man, and to put him upon inquiry, is equivalent to knowledge of the ultimate fact.⁸¹ And it is not essential to show that the lessor witnessed or had knowledge of the particular sales upon which the tenant was convicted; it is enough to allege and prove that the lessor had knowingly permitted the occupant to use the premises for the unlawful sale of liquor during the time when such sales were made.⁸² The gist of the landlord's offense is his permitting his premises to be used for purposes violative of the liquor law, when he might have prevented it. Hence, to convict one under these statutes, it is essential that he should have had such control over the property as to be in a position to prevent or stop the illegal acts of the tenant. For this reason, one to whom property has been conveyed by a deed absolute in form, but in fact a mortgage, and who has neither the possession nor right of possession, cannot be guilty of permitting the premises to be used for the maintenance of a liquor nuisance.⁸³ So a lessor cannot be convicted unless the lease specially reserves his control of the building, although the same statute provides that the owner may, in cases of the kind, recover possession by entry or action.⁸⁴ In Kansas, the statute creates a lien, in favor of the state, for fines and costs adjudged against a person for unlawfully selling liquor, on premises leased to the convicted person, and knowingly suffered by the owner to be occupied and used for the purpose. This lien, it is held, attaches to the leased premises and operates on them from the date of the conviction of the tenant, and all conveyances made after that date are subject to such lien.⁸⁵ In establishing the ownership of property against which such a lien is sought to be

⁸⁰ *State v. Potter*, 30 Iowa. 587; *State v. Shanahan*, 54 N. H. 437.

⁸¹ *Cordes v. State*, 37 Kans. 48, 14 Pac. Rep. 493. The landlord cannot be held responsible for the acts of a subtenant in keeping a saloon for the sale of liquor on the premises, in violation of law, merely because he knows of it and does not interfere. *Koester v. State*, 36 Kans. 27, 12 Pac. Rep. 339.

⁸² *Cordes v. State*, 37 Kans. 48, 14 Pac. Rep. 493.

⁸³ *State v. Bates*, (Vt.) 19 Atl. Rep. 229.

⁸⁴ *Comm. v. Wentworth*, 146 Mass. 36, 15 N. E. Rep. 138.

⁸⁵ *Snyder v. State*, 40 Kans. 543, 20 Pac. Rep. 122.

enforced, a deed purporting to convey property to the defendant is admissible in evidence, where the description, in connection with well-known facts that are in testimony, fairly designates the property described in the petition.⁸⁶ In such action, the title to the property being in the name of a wife, the husband is properly joined as a party defendant.⁸⁷

⁸⁶ Cordes v. State, 37 Kans. 48, 14 Pac. Rep. 493.

⁸⁷ Pfefferle v. State, 39 Kans. 128, 17 Pac. Rep. 828.

CHAPTER XVII.

CRIMES AND OFFENSES UNDER THE LIQUOR LAWS.

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§ 383. Grade of Offenses.

Offenses against the liquor laws, such as illegal sales of intoxicants, keeping liquor in possession with the intent to dispose of it unlawfully, illegally transporting liquor from place to place, and the like, are statutory crimes, not being punishable at common law. They are also of the description of *mala prohibita*, as there is no inherent immorality in such acts, and their illegality lies only in the fact of their being positively prohibited. Further, it is held that the offense of selling intoxicating liquor in contravention of a state statute, though punishable by imprisonment, is not an "infamous crime," in such sense that it must be prosecuted by presentment or indictment, within a constitutional provision in that behalf.¹ And the

¹State v. Nolan, 15 R. I. 529, 10 Atl. Rep. 481. And see United States v. Maxwell, 3 Dill. 275.

various criminal infractions of the laws now under our consideration are not, as a rule, of the grade of felonies, although there may possibly be some cases in which they are declared such by statute. They are generally regarded and punished as misdemeanors. Thus, the selling of liquor without a license is punishable as a misdemeanor under a statute upon that subject, although the statute contains no other prohibition than the imposition of a penalty, and a provision that all offenses against the terms of the act shall be deemed misdemeanors.² And the same act is a misdemeanor although described in the statute simply as an offense.³

§ 384. Illegal Sales.

A great part of the substantive law of criminal offenses against the liquor statutes is taken up with the subject of illegal sales,—such as sales without license, in prohibited places, on prohibited days, to particular classes of persons, and so on. But as these topics form, in a sense, a connected whole, and as they constitute so large and important a part of the criminal law of intoxicating liquors, it seems best to reserve them for a separate discussion, and the reader is therefore referred to the succeeding chapter for a full consideration of illegal sales as criminal offenses.

§ 385. Being a Common Seller.

In several of the New England states, the statutes prescribe a penalty for any person who shall be found guilty of being a “common seller” of intoxicating liquor, or who shall “presume to be a common seller” thereof.⁴ While it is evident that these statutes primarily contemplate the case of one who has a fixed place of business, where he customarily pursues the occupation of vending liquors, it is held that a man who travels about with liquors on his person, making sales of the same, may be indicted as a common seller.⁵ And where the penalty is against “a manufacturer of any spirituous or intoxi-

²People v. Brown, 16 Wend. 561.

³Hill v. People, 20 N. Y. 363.

⁴See Foster v. Haines, 13 Me. 307;
State v. Davis, 23 Me. 403.

⁵State v. Grames, 68 Me. 418.

cating liquors for sale, or a common seller thereof," it extends to a common seller of liquors not manufactured by himself.⁶ To complete this offense, it is not necessary that the defendant should have known or supposed that the liquor sold by him was intoxicating; the crime being statutory, ignorance is no defense, and the intent is not material.⁷ In the absence of statutory aid, it is somewhat difficult to determine how many separate sales of liquor a man must make before he can be called a "common seller," or how many must be put in evidence before the jury will be justified in putting that character upon him. From the employment of the word "common," it is apparent that a person who in a single instance sells liquor, as an exceptional matter and not as a part of his business, cannot be regarded as within the meaning of the phrase. The language employed implies that the selling must be usual or habitual with him; it must be a part or the whole of his regular avocation, or at least the act must be repeatedly done. But although it might be thought, from analogous uses of the word "common," that the phrase was meant to describe one who sold liquor to all such as might apply to him for it, yet the decisions would not warrant us in this inference. They indicate that a man might be a common seller of liquor although he retailed it only to certain chosen persons and refused to sell it indiscriminately. It seems, therefore, to be the accepted doctrine, in the absence of a statutory definition, that no particular number of sales need be proved to constitute one a common seller, but the jury must be satisfied, from the evidence, that selling liquor was the common and ordinary business of the defendant, and they will be authorized to find him guilty without proof of any particular or fixed number of sales.⁸ In Massachusetts, however, the statute provides that three several sales of spirituous or intoxicating liquor shall be sufficient evidence of the character of the defendant as a common seller. This provision, it is held, is valid and constitutional,⁹ and under it, it is the duty of the court to instruct the jury

⁶ Comm. v. Bralley, 3 Gray, 456.

⁷ Comm. v. Boynton, 2 Allen, 160.

⁸ State v. O'Conner, 49 Me. 594. Four specific deliveries of liquor within eight

days are sufficient to warrant a conviction of being a common seller. State v. Day, 37 Me. 244.

⁹ Comm. v. Burns, 9 Gray, 132.

that proof of three sales is enough evidence to warrant a verdict of guilty.¹⁰ It is not a material inquiry whether the three sales were all made to the same person or to different persons.¹¹ And it is held that the offense may be committed by making a sufficient number of unlawful sales on the same day.¹² Sales of three glasses of liquor in the course of the same evening, each of the first two of which is drunk and paid for before the next is delivered, if found by the jury to be three distinct and independent transactions, are sufficient evidence to convict the vendor of being a common seller.¹³ It is also to be remarked that the criminality of the character of being a common seller is a distinct thing from the criminality of the several illegal sales made in that occupation. Hence, under these statutes, a man may be convicted and punished for each illegal sale which he makes, and if he makes three or more such sales, he may *also* be convicted and punished for being a common seller of liquor.¹⁴

§ 386. Pursuing the Business of Selling Liquor.

Under the laws of the United States, and under the statutes of several of the states, it is made a penal offense to "engage in," or to "pursue," or to "carry on, the business of a retail liquor-dealer," without procuring a license or paying a tax. To constitute this offense, it is held, the accused must have procured the liquor sold with intent to retail it, or, having it on hand, must have formed the intent to retail it, and carried out that intent by one or more acts. It is not enough that, having the liquor on hand for his own use, he let others have it as a matter of kindness or neighborliness, although he took money from them for the accommodation.¹⁵ But a single sale of liquor by one who *intends to continue* selling is sufficient to render him guilty of "engaging in or carrying on the business" of a liquor-dealer.¹⁶ Yet it is essential, if only one act of selling is relied

¹⁰Comm. v. Kirk, 7 Gray, 496. See State v. Williams, 6 R. I. 207.

¹¹Comm. v. Odlin, 23 Pick. 275.

¹²Comm. v. Perley, 2 Cush. 559.

¹³Comm. v. Rumrill, 1 Gray, 388.

¹⁴State v. Johnson, 3 R. I. 94; Comm. v. Porter, 4 Gray, 426.

¹⁵United States v. Bonham, 31 Fed. Rep. 808.

¹⁶Abel v. State, (Ala.) 8 South. Rep. 760.

on, to show that it was made as a part of an actual or intended business, or to connect it with proof of an intention to pursue the occupation. Thus, an indictment for this offense is not sustained by evidence of a single sale of liquor by a farmer and carpenter without proof of such intent.¹⁷ So a person whose business is that of a butcher, but who sells liquor once without a license, cannot be regarded as one engaged in the "business or employment" of retailing, and is not liable to the penalty.¹⁸ Selling an occasional drink of spirits out of a bottle, not in a bar-room, where no intention of defrauding the national revenue is apparent, is not "carrying on the business of a retail liquor-dealer," without having paid the special tax, in the contemplation of the federal statute.¹⁹ And so, the gratuitous distribution of liquor at a public gaming-table, does not constitute the proprietor a retailer.²⁰ And one who assigns a due-bill payable in whisky does not thereby become a dealer in intoxicating liquors.²¹ But it is held, in Vermont, that the penalty for "dealing in the selling of foreign or domestic distilled spirituous liquors," without a license, may be incurred by a single act of selling.²² In Texas, where the prohibition of the statute is against "pursuing the occupation" of selling intoxicating liquors without payment of the tax levied on such occupation, it is held that a single unlicensed sale is not enough to constitute the offense.²³ Neither is it correct to charge the jury that "different sales at different times, near each other, to different persons, would constitute the occupation of selling."²⁴ Where the statute prohibits peddlers from "carrying for sale, or offering for sale, or obtaining orders for the sale of, any intoxicating liquors," it is held that this creates distinct offenses, not joinable in the same count.²⁵

¹⁷ Bryant v. State, 46 Ala. 302.

¹⁸ Moore v. State, 16 Ala. 411. A statute making it an offense to carry on the business of selling liquor without paying a license tax does not repeal by implication a statute designed to punish occasional sales of liquor by unauthorized persons having no regular places of business. Blackwell v. State, 45 Ark. 90.

¹⁹ United States v. Jackson, 1 Hughes, 581.

²⁰ United States v. Mickle, 1 Cranch, C. C. 268.

²¹ Schweyer v. Oberkoetter, 25 Ill. App. 188.

²² State v. Chandler, 15 Vt. 425.

²³ Stanford v. State, 16 Tex. App. 331; Merritt v. State, 19 Tex. App. 435; Halfin v. State, 18 Tex. App. 410; Williams v. State, 23 Tex. App. 499, 5 S. W. Rep. 136.

²⁴ McReynolds v. State, 26 Tex. App. 372, 9 S. W. Rep. 617.

²⁵ State v. Smith, 61 Me. 386.

§ 387. Unlawful Keeping of Liquors.

In many of the states the statutes are so framed as to impose a penalty on any person who shall keep intoxicating liquor with the intent to sell the same unlawfully. Without the statute, such keeping and intent would not constitute a punishable offense. "At common law, the mere having of a thing, while not using it, with the intent therewith to commit a crime, even a felony, is not indictable. Hence, *a fortiori*, it is not a common law offense to be in possession of liquors with intent to commit the misdemeanor of selling them contrary to the regulations of a statute."²⁶ Under the statutes denouncing a penalty upon such unlawful keeping, it is held that the guilty intent need not include a knowledge by the seller of the intoxicating quality of the liquor.²⁷ And although the defendant may be duly authorized to sell liquor under certain circumstances, or for certain purposes, or in certain places or districts, as where he is the appointed agent for such sale in a given city or town, yet if he actually intends to dispose of the liquors in his possession in ways or in places where his authorization would not protect him, he is indictable for the unlawful keeping.²⁸ So long as the owner of liquors retains possession of them, intending to deliver them on an unlawful contract of sale, such possession is within a statute or ordinance which prohibits the keeping of liquors for unlawful sale.²⁹ Where the language of the statute is that it shall be an offense to keep intoxicating liquors with intent "to sell the same within the state, contrary to law," the intent need not be to sell in or from the building in which the liquors are kept.³⁰ And if the statute omits the words "within the state," the crime is committed by keeping the liquors within the state, although with intent to sell and export them to another state.³¹ In Maine, the law is very comprehensive and stringent, providing

²⁶ Bishop, Stat. Crimes, § 1054.

²⁷ Comm. v. Goodman, 97 Mass. 117.

²⁸ State v. Connelly, 63 Me. 212.

²⁹ Menken v. Atlanta, 78 Ga. 668, 2 S. E. Rep. 559; Griffin v. Atlanta, 78 Ga. 679, 4 S. E. Rep. 154.

³⁰ State v. Viers, (Iowa.) 48 N. W. Rep. 732.

³¹ State v. Guinness, 16 R. I. 401, 16 Atl. Rep. 910.

that it shall be unlawful to deposit or have in one's possession intoxicating liquors, with the intent to sell them within the state in violation of law, or with intent that the same shall be so sold by any person, or to aid or assist any person in such sale thereof. Under this statute, it is held that, to complete the offense, it is not necessary that the keeper shall intend to make the unlawful sale himself, where there is a keeping with the intent that an unlawful sale shall be made in the state by any person, or with the intent to aid or assist in such unlawful sale.³² It is further necessary to remark that to *sell* liquor unlawfully and to *keep* it for sale unlawfully are entirely distinct offenses under these statutes, founded on distinct criminal purposes, and completed by different criminal acts. Hence it follows that although the offender will be liable to prosecution under a statute for the unlawful selling of liquors, when the sale is consummated, this will not hinder his being punished for the unlawful keeping of the liquors before the sale.³³ For the same reason, a conviction or acquittal for one of these offenses is no bar to a prosecution for the other, and the evidence of a sale, admitted on a trial for the selling, is admissible on a subsequent trial for the unlawful keeping.³⁴ On the same principle, it is held, in Iowa, that an information charging that defendant kept intoxicating liquor with intent to sell the same, is no bar to an indictment charging that he established and continued a building and place in which he kept liquor with intent to sell.³⁵

§ 388. Maintaining Liquor Nuisance.

We have already seen that the statutes in several of the states declare that all buildings and places kept for the unlawful sale of liquor shall be deemed common nuisances, and provide for their injunction or abatement by proceedings in equity.³⁶ These statutes also, as a rule, make provision for the criminal prosecution of the person guilty of maintaining the nuisance. To constitute the offense, it is necessary that a sale or sales of liquor should have been made

³² *State v. Kaler*, 56 Me. 88.

³³ *Griffin v. Atlanta*, 78 Ga. 679, 4 S. E.

Rep. 154.

³⁴ *State v. Head*, 3 R. I. 135.

³⁵ *State v. Harris*, 64 Iowa, 287, 20 N.

W. Rep. 439.

³⁶ *Supra*, §§ 338-349.

in violation of some law or ordinance.³⁷ But it is not necessary, for a conviction for maintaining a liquor nuisance, that the sale of liquor should be the main purpose of the place or one of its main purposes.³⁸ And the decisions clearly indicate that the repetition, or the frequency, of illicit sales is not the test by which to determine the character of the place as a nuisance. A single sale, it is held, will warrant a conviction on an indictment for maintaining a nuisance by keeping a saloon for the unlawful sale of liquor. "The keeping of intoxicating liquors, with the intent to sell them contrary to law, is the act of defendant creating the nuisance. One sale will disclose the unlawful intent as well as the keeping. Hence upon one unlawful sale a conviction may be had for nuisance."³⁹ So where the law provides that houses where drunkenness, quarreling, and breaches of the peace are carried on, to the disturbance of others, shall be deemed nuisances, a place where such acts are done but once is a nuisance.⁴⁰ But in Wisconsin, under an act providing that all places where liquors are sold in violation of law are public nuisances, it is held, that a sale of liquor on Sunday by a licensed saloon-keeper, in the absence of evidence showing that a city ordinance had been passed forbidding the sale of liquor on that day, is not such a violation of the law as to render the place in which it was sold a nuisance.⁴¹ Two or more persons may be jointly guilty under these statutes. For several may participate in the maintenance of a nuisance. And if two are jointly indicted, it is not necessary to show that they carried on the place in partnership.⁴² Nor is it essential that the defendant should have had the ultimate or absolute control of the building.⁴³ A statute declaring buildings used for the illegal sale of intoxicating liquors to be common nuisances, and to be treated as such, does not necessarily

³⁷ *State v. Waynick*, 45 Iowa, 516; *State v. Johnson*, 61 Iowa, 504, 16 N. W. Rep. 534.

³⁸ *State v. Hoxsie*, 15 R. I. 1, 22 Atl. Rep. 1059.

³⁹ *State v. Reyelts*, 74 Iowa, 499, 38 N. W. Rep. 377. But the Illinois act does not include a place where liquor is illegally sold in a single instance without the actual permission or consent of the

keeper. *Nicholson v. People*, 29 Ill. App. 57.

⁴⁰ *State v. Pierce*, 65 Iowa, 85, 21 N. W. Rep. 195.

⁴¹ *State v. Wacker*, 71 Wis. 672, 38 N. W. Rep. 189.

⁴² *State v. Hoxsie*, 15 R. I. 1, 22 Atl. Rep. 1059.

⁴³ *State v. Chapman*, (S. Dak.) 47 N. W. Rep. 411.

repeal a law authorizing the indictment of a person for being a common seller of such liquors in a building.⁴⁴

§ 389. Keeping Place for Sale of Liquors.

Closely analogous to the statutes considered in the preceding section are the laws, found in many states, against "keeping a place for the unlawful sale of liquors," or keeping a "public bar," or a "place of public resort" for illicit selling and drinking, and the like. Thus, in Iowa, the code makes it an offense to maintain a building in which liquors are sold or kept for sale contrary to law; and it is held to be an offense to maintain a building in which liquors are illegally sold, though no liquors are kept in that building.⁴⁵ So, in Indiana, the law provides that whoever keeps a place where intoxicating liquors are sold, bartered, given away, or suffered to be drunk in a disorderly manner, to the annoyance or injury of any part of the citizens of the state, shall be fined, etc. And this, it is held, forbids the keeping of a place in a disorderly manner, and not merely the selling or dispensing of liquor in such manner.⁴⁶ In other states, the prohibition of the act is against the keeping of a place for the sale of liquor "as a place of public resort." And it is adjudged that a dwelling-house is such a place if it is frequented by the public (though for the purpose of purchasing non-intoxicating drinks only) with the same freedom that men exercise in going to ordinary public resorts for drinking purposes.⁴⁷ And the particular number of customers does not furnish the test by which to determine whether the place in question is a place of public resort.⁴⁸ In Massachusetts, it is a statutory offense to keep or maintain a tenement used for the illegal keeping

⁴⁴ *Comm. v. Roland*, 12 Gray, 132.

⁴⁵ *State v. Viers*, (Iowa,) 48 N. W. Rep. 732. In a prosecution for keeping a place for the sale of intoxicating liquors, an instruction that defendant could not be convicted "if in good faith he believed he had a right to sell," is improper. *State v. Mullenhoff*, 74 Iowa, 271, 87 N. W. Rep. 329.

⁴⁶ *Nace v. State*, 117 Ind. 114, 19 N.

E. Rep. 729. And it is held that the word "citizens," as used in this statute, includes "residents." *Skinner v. State*, 120 Ind. 127, 22 N. E. Rep. 115.

⁴⁷ *State v. Spaulding*, 61 Vt. 505, 17 Atl. Rep. 844. See, also, *Bandalow v. People*, 90 Ill. 218.

⁴⁸ *State v. Spaulding*, 61 Vt. 505, 17 Atl. Rep. 844.

or sale of liquor. And it is there ruled that a "tenement" may consist of two rooms used together and immediately connected together, and if the two are used alternately and interchangeably for the illegal sale or keeping of liquors, they may be considered as parts of one and the same tenement, and the illegal use of either, while thus connected and used, is an illegal use of the tenement.⁴⁹ In the same state there is a decision that a licensed victualler may be convicted of keeping a "public bar," under a statute in that behalf, if he sells and delivers liquors, not in connection with food, indiscriminately to such persons as may call for them, over a bar or counter, although there is no public display of the liquors, and the bar is also used for luncheon purposes.⁵⁰ In Connecticut, the law imposes a penalty on every person who, without a license, shall keep a place where "it is reputed" that intoxicating liquors are sold or kept for sale. It is not necessary, to constitute the offense, that it should be reputed that the defendant had no license, if the reputation of the place as one where liquor was kept for sale is shown.⁵¹ But the reputation must be "an honest one, founded on the true and honest opinion of the neighborhood."⁵² And the statute does not apply to an inclosed park, containing several acres of land, within which is an uninclosed and uncovered platform for dancing, from which beer is sold.⁵³ It is further to be remarked that the statutory offense of the "keeping of a place" for the unlawful sale of liquor is an entirely distinct offense from that of selling liquor unlawfully; and this, although the statute does not define the place as one of public resort.⁵⁴

§ 390. Keeping Disorderly House.

A person who sells liquor and permits it to be drunk on his premises is liable for the disorderly conduct of those to whom he sells, in and about his shop, as for keeping a disorderly house.⁵⁵ And in a

⁴⁹ Comm. v. Fraher, 126 Mass. 56.
See, also, Comm. v. Welch, 147 Mass.
374, 17 N. E. Rep. 895.

⁵⁰ Comm. v. Rogers, 135 Mass. 536.

⁵¹ State v. Buckley, 40 Conn. 246.

⁵² State v. Morgan, 40 Conn. 44. And
see State v. Moriarty, 50 Conn. 415.

⁵³ State v. Barr, 39 Conn. 40.

⁵⁴ Oshe v. State, 37 Ohio St. 494.

⁵⁵ State v. Burchinal, 4 Harr. (Del.)
572.

case where a person was indicted for keeping "a disorderly house called a tippling-house," where he sold liquor without license, and gathered together noisy and drunken people who quarreled and fought, to the great annoyance and disturbance of the people, it was held that the defendant might be liable although the quarreling and fighting were in the street, and that the prosecution was not bound to prove that the defendant knew of the alleged annoyance.⁵⁶ Further, although the defendant may be duly licensed for the sale of liquor, that will not protect him in maintaining his house in a disorderly manner or in suffering turbulent or disorderly assemblages on the premises. For instance, if a person holding a license to retail liquor causes and procures evil-disposed persons to congregate in and about his house, and permits them to remain there drinking and behaving in a boisterous and disorderly manner, this constitutes the house a public nuisance, and the keeper of it is indictable.⁵⁷ But it is held that proof of a single instance of disorder will not sustain a conviction, under a statute, for keeping a place where liquors are sold in a disorderly manner.⁵⁸

§ 391. Furnishing Liquor in Theatres.

Where a statute is in force which prohibits the furnishing of liquors inside any theatre or place of amusement or "any apartment opening into the same," it is held that the act of the proprietor of a theatre, who gives tickets to persons admitting them to a wine-room in an adjoining building, which is accessible by stairs from his bar-room, whence liquors are sent, amounts to a violation of the statute.⁵⁹

§ 392. Selling Liquor to be Drunk on Premises.

In some jurisdictions, the sale of liquor, in less quantities than a certain measure, "to be drunk on the premises," is prohibited by law; and in others, the holders of certain classes of licenses are forbidden to make sales for such purpose. In a prosecution on these

⁵⁶ Cable v. State, 8 Blackf. 531. Compare Dunnaway v. State, 9 Yerg. 350.

⁵⁸ Overman v. State, 88 Ind. 6.

⁵⁹ State v. White, 7 Baxt. 158.

⁵⁷ State v. Mullikin, 8 Blackf. 260.

statutes, it is said, it is not necessary to prove that the liquor was in fact drunk on the premises; the essence of the offense is the selling of it for the purpose and with the intention that it should be so drunk.⁶⁰ It is also ruled that the defendant may show, in defense, that he both bought and sold the liquor with the understanding and belief that it was not intoxicating liquor.⁶¹ But it is the duty of the person who sells the liquor to do what he can to prevent its being drunk on his premises.⁶² And one who permits liquor to be drunk in his house and in his presence, without objection, will be presumed to consent thereto.⁶³ The cases arising under statutes of this character have for the most part turned on the question of the place where the liquor was drunk being on or off the premises of the seller. And the opinion has been advanced that the place of the drinking must be some place over which the seller has the legal right to exercise authority and control.⁶⁴ This rule probably depends, in some measure, on the principle above stated, that it is the duty of the seller to forbid the drinking on his premises and prevent it if he can. And if the statute says no more than that the liquor shall not be sold to be drunk "on the premises," the rule is probably well-founded, for in that case it merely defines the word "premises." Thus, where the liquor is handed through a window, to be drunk on the seller's back steps, there is a violation of the statute.⁶⁵ And so where the liquor is drunk from glasses of the seller on a bench used by him in a mill-yard some fifteen or twenty steps from his house.⁶⁶ So also, where it is drunk on the lot on which defendant's shop is situated, out of glasses furnished by him, customers being accustomed to drink there.⁶⁷ And so again, where the purchaser stepped out of the rear door of the saloon opening into a room for-

⁶⁰ *Comm. v. Luddy*, 143 Mass. 563, 10 N. E. Rep. 448. An ordinance providing that no person shall sell liquors in less quantities than a quart to be drunk on the premises, without a license, does not prohibit the sale of quantities less than a quart to be taken from the premises. *State v. Pratt*, 52 N. J. Law, 306, 19 Atl. Rep. 607.

⁶¹ *Farrell v. State*, 32 Ohio St. 456, 30 Am. Rep. 614.

⁶² *Christian v. State*, 40 Ala. 376.

⁶³ *Cochran v. State*, 26 Tex. 678.

⁶⁴ *Downman v. State*, 14 Ala. 242; *Swan v. State*, 11 Ala. 594; *Daly v. State*, 33 Ala. 431.

⁶⁵ *Stockwell v. State*, 85 Ind. 522.

⁶⁶ *Swan v. State*, 11 Ala. 594.

⁶⁷ *Shields v. State*, 95 Ind. 299.

merly used as a bowling-alley, and where customers were in the habit of drinking liquor purchased in the saloon, and there drank what he had bought, about twenty feet from the rear door.⁶⁸ But where the purchaser took the liquor to a shed, some fifteen or twenty feet distant from the seller's premises, and there drank it, and there was no agreement or understanding between the buyer and seller as to where the liquor was to be drunk, it was held that the seller had not violated the law.⁶⁹ But where, as in some of the states, the statute uses a more comprehensive expression than that above supposed, and forbids the sale of liquor to be drunk "on or about the premises," the question is entirely different. In such case, it is held that the designation embraces places over which the seller has no legal right to exercise authority or control, but which are so near to his premises, and so situated in relation thereto, that they are within the mischief intended to be remedied.⁷⁰ Thus, in a prosecution under such a statute, it is no defense that the liquor, though drunk within five or six steps of defendant's store, was drunk in the public road over which he had no control; nor will it avail as a defense that he did not notice the act of drinking at the time.⁷¹ And although, in a majority of cases, it may be a question of fact for the jury whether the place at which the liquor is drunk is "about the premises" of the seller, yet, where it is shown that the drinking was in the highway, in front of the seller's store, in full view thereof, and within a distance of ten or twenty steps, the court may instruct the jury that it was drunk "about the premises."⁷² In one of the cases arising under such a statute, the evidence showed that while the defendant, with two other persons, was at work on a ditch on a plantation belonging to another owner, about a mile from defendant's house, the defendant sold whisky to his companions, which they drank on the spot; and it was held that a conviction was right.⁷³ In another case, it was ruled that defendant might be found guilty of selling liquor to be

⁶⁸ Stout v. State, 98 Ind. 150.

⁶⁹ O'Connor v. State, 45 Ind. 351.

⁷⁰ Easterling v. State, 30 Ala. 46.

⁷¹ Whaley v. State, 87 Ala. 83, 6 South.

Rep. 380. See, also, Patterson v. State, 36 Ala. 297.

⁷² Brown v. State, 31 Ala. 353.

⁷³ Powell v. State, 63 Ala. 177.

drunk "on or about the premises," if he went to a public vendue, taking liquor with him in his buggy, and there sold a quart of the same to several persons.⁷⁴

§ 393. Keeping Open on Prohibited Days.

In many of the states, it is made a criminal offense to "keep open" a bar-room or liquor-saloon on certain prohibited days. The days usually specified in the statutes are Sundays, legal holidays, and election days. And it is held that Christmas day is a legal holiday within the meaning of that term as used in these laws.⁷⁵ It will be observed that while the liquor laws commonly prohibit the *sale* of intoxicants on such days, the *keeping open* of a place for such sale on a prohibited day is an entirely distinct and independent offense. It cannot be said that one of these crimes is of a higher grade than the other, or that either merges in the other. On the contrary, if a liquor-dealer keeps his shop open on a Sunday and then and there sells a glass of liquor, he is guilty, under these statutes, of two offenses, and may be punished for both.⁷⁶ Hence an actual sale of liquor is not necessary to complete the offense of keeping open. And on an indictment for that offense, it need not be alleged or proved that the defendant sold liquor, or that the keeping open of his shop was a nuisance or hurtful to the neighborhood in respect to morals or otherwise.⁷⁷ So a man may be convicted for keeping open a bar-room in his restaurant after the lawful hours for selling, although he sold no liquor after the hour for closing, and drew a curtain around the bar before that hour.⁷⁸ But in Illinois, it is held that merely opening a

⁷⁴ *Pearce v. State*, 40 Ala. 720.

⁷⁵ *Reithmiller v. People*, 44 Mich. 280, 6 N. W. Rep. 667.

⁷⁶ *State v. Ambs.* 20 Mo. 214; *Hudson v. Geary*, 4 R. I. 485. It is a breach of a licensee's bond, conditioned to "duly observe all laws relating to intoxicating liquors," to keep open on Sunday a place where such liquors are exposed for sale, though a violation not of the liquor law, but of the statute in regard to Sunday. *Quintard v. Corcoran*, 50 Conn. 34.

⁷⁷ *Hall v. State*, 3 Ga. 18. But where an ordinance imposed a penalty on any licensed retailer who should, on Sunday, "open his shop, where he retails, for the purpose of selling," etc., of the sum of \$25 for each offense of selling, *held*, that no penalty was incurred except for selling. *Lincolnton v. McCarter*, Busb. L. 429. See Pub. Acts Mich. 1887, No. 318, § 17, p. 455.

⁷⁸ *Baldwin v. Chicago*, 68 Ill. 418.

house on Sunday and permitting people to resort there, no tipping being intended or allowed, will not constitute the offense of keeping open a tippling-house on Sunday.⁷⁹ But the keeper of a boarding-house is guilty of the offense, though he sells but a single glass of beer, if his saloon is accessible to the public on that day.⁸⁰ A statute of this character contemplates but a single offense, whether the saloon is open once or many times during the same day.⁸¹ And it is said that the statute is violated by the proprietor keeping the place open but for a moment and for any cause.⁸²

In regard to the meaning of the word "open," and the degree of accessibility of the saloon, it is held that, in order to constitute the offense, it is not necessary that the house should be kept open in the same manner as on ordinary and lawful days. It will be within the statutory offense, if it is so kept that access may be had thereto on the prohibited day, and facilities afforded for the obtaining of intoxicating drinks, and it is not material whether the access is by the front door or back door, or whether the door is kept open or is only opened on application for admittance.⁸³ And although that part of the house where the bar is situated may not be open to the public, yet if other rooms in the house, connected with the bar-room, and habitually or occasionally used for drinking purposes, are accessible to persons desiring liquor, such rooms are regarded as a part of the saloon, and, while they are open, the saloon is not closed as the law requires.⁸⁴ One is guilty of keeping open a tippling house on Sunday, if liquor is then retailed and drunk in his restaurant in the rear of his office, the buyers entering by simply pushing open the street door of the office, notwithstanding the bar may be concealed from view by a canvas bearing the sign "Bar closed."⁸⁵

In some jurisdictions, it is held that merely opening the door of the saloon does not constitute the statutory offense, unless it is kept

⁷⁹ Weidman v. People, 7 Ill. App. 38.

⁸⁰ Koop v. People, 47 Ill. 327.

⁸¹ People v. Cox, 70 Mich. 247, 38 N. W. Rep. 235.

⁸² Monses v. State, 78 Ga. 110.

⁸³ Kroer v. People, 78 Ill. 294; People v. Cummerford, 58 Mich. 328, 25 N. W.

Rep. 203. See People v. Beller, 73 Mich. 640, 41 N. W. Rep. 827.

⁸⁴ People v. Higgins, 56 Mich. 159, 22 N. W. Rep. 309; People v. Cox, 70 Mich. 247, 38 N. W. Rep. 235; Harvey v. State, 65 Ga. 568.

⁸⁵ Hussey v. State, 69 Ga. 54.

open as on secular days, *i. e.*, for tippling purposes.⁸⁶ And it may be admitted that, when no drinking is permitted or intended, the place is not open in its character as a saloon or tippling-house. But, in general, the authorities recognize no such distinction as this. If the place is in fact a bar-room or saloon, and if it is open and accessible to the public, that is enough. The purpose of its being open is not material. Though the purpose may have been a perfectly innocent and harmless one, that does not lessen the criminality of the act.⁸⁷ Thus, under the Michigan statute, it is a violation of the law if the saloon was open for the purpose of being cleaned, although no liquor was sold.⁸⁸ But the opening of a bar-room on Sunday, not for the purpose of dispensing liquor, but in response to the knock of an officer, to allow him to search for a person, although a crowd follows him into the bar, is not a violation of the statute.⁸⁹ In Connecticut, where the statute forbids the keeping open, on certain days, of any place where intoxicating liquors are "reputed" to be sold, it is held that the reputation applies to any time, and to sales lawfully made under a license.⁹⁰ And the statute may include an entire hotel having such reputation, although liquor may not have been sold in all its rooms; but the house may yet be kept open on Sundays for boarders and travelers.⁹¹ An ordinance, which provides that no licensed tavern keeper shall expose intoxicating liquors for sale on Sunday, is not violated by merely having liquors exposed at the bar, without some affirmative act offering to make sale of them.⁹²

§ 394. Illegal Transportation of Liquors.

In several of the states we find statutes prohibiting the transportation of liquors from place to place, having knowledge, or reasonable cause for belief, that they are intended for unlawful sale. This,

⁸⁶ *Patten v. Centralia*, 47 Ill. 370.

⁸⁷ *Klug v. State*, 77 Ga. 734; *Hall v. State*, 3 Ga. 18; *Monsees v. State*, 78 Ga. 110. See, also, *Croell v. State*, 25 Tex. App. 596, 8 S. W. Rep. 816.

⁸⁸ *People v. Waldvogel*, 49 Mich. 387, 13 N. W. Rep. 620.

⁸⁹ *Miller v. State*, (Miss.) 9 South. Rep. 289.

⁹⁰ *State v. Cady*, 47 Conn. 44.

⁹¹ *State v. Ryan*, 50 Conn. 411.

⁹² *Houtsch v. Jersey City*, 29 N. J. Law, 316.

it is held, includes the conveyance of liquors from one place to another in the same town,⁹³ as their carriage from wholesale to retail dealers in the same city.⁹⁴ And if common carriers are criminally prosecuted for the transportation and delivery of liquor, under these statutes, it is no defense to allege that they acted merely as agents or carriers and were compelled to do what they did. For the law neither requires nor permits common carriers to do illegal acts, and they are not bound to transport any particular commodities, if thereby they incur a penalty.⁹⁵ Where the act forbids the conveyance of liquors by express companies or their employes, common carriers or their employes, "or any other person," it is held that the driver of a team for one who undertakes with his own wagons to deliver liquors is punishable, the driver being within a class of like kind with those enumerated to which the words quoted refer.⁹⁶ Where the prohibition is against "receiving for conveyance liquors unlawfully sold or intended for unlawful sale," the offense consists in receiving for the purpose of conveying to a purchaser, and thus completing the intended sale; and as the purchaser's intention in regard to the liquor is immaterial, it is not necessary that he should be named, or that his authority to sell should be negatived in the complaint.⁹⁷ And where defendant is charged with bringing liquors into a city, having reasonable cause to believe the same were intended to be sold in violation of law, it is proper to receive evidence of the general reputation of the consignee as a liquor-seller and of the discoveries made on a search of his premises by an officer.⁹⁸

§ 395. Introduction of Liquor into Indian Country.

By the laws of the United States it is made a criminal offense to introduce or attempt to introduce any ardent spirits, spirituous liquors, or wine, into the Indian country.⁹⁹ This legislation is enacted

⁹³ *Comm. v. Waters*, 11 Gray, 81.

⁹⁴ *State v. Campbell*, 76 Iowa, 122, 40 N. W. Rep. 100.

⁹⁵ *State v. Goss*, 59 Vt. 266, 9 Atl. Rep. 829.

⁹⁶ *State v. Campbell*, 76 Iowa, 122, 40 N. W. Rep. 100.

⁹⁷ *Comm. v. Locke*, 114 Mass. 288.

⁹⁸ *Comm. v. Harper*, 145 Mass. 100, 13 N. E. Rep. 459.

⁹⁹ Rev. St. U. S. § 2139. See, also, Act Congr. July 4, 1884, c. 180, § 4, (Supp. to Rev. St. U. S., Edn. 1891, p. 450.)

in virtue of the constitutional power of congress to regulate commerce with the Indian tribes; and it is held that congress may not only prohibit the unlicensed introduction and sale of liquors in the Indian country, but may extend such prohibition to territory in proximity to that occupied by Indians.¹⁰⁰ An Indian agent, in carrying out the provisions of this law, is justified in seizing the property of a third person, which is being used by the person making such introduction of liquors as a means to his purpose.¹⁰¹ But it is ruled that the act of congress referred to is not violated by the transportation of ardent spirits as an article of commerce *through* an Indian country, between places outside the same.¹⁰²

§ 396. Importation of Liquor into Alaska.

By an act of congress entitled "An act providing a civil government for Alaska," it is declared that "the importation, manufacture, and sale of intoxicating liquors in said district, except for medicinal, mechanical, and scientific purposes, is hereby prohibited, under the penalties which are provided in section 1955 of the Revised Statutes for the wrongful importation of distilled spirits. And the President of the United States shall make such regulations as are necessary to carry out the provisions of this section."¹⁰³ The section of the Revised Statutes here referred to was construed by the courts as absolutely prohibiting the introduction of spirituous liquor or wine into Alaska, subject to the power of the war department to permit the same for the use of the army, and the power of the President to permit the introduction of distilled spirits, but not wine, for any purpose.¹⁰⁴ It is probable, however, that these provisions must be

¹⁰⁰ United States v. 48 Gallons of Whisky, 98 U. S. 188. And see American Fur Co. v. United States, 2 Pet. 358; United States v. Shaw-Mux, 2 Sawy. 364; United States v. Holliday, 3 Wall. 407. As to what constitutes the Indian country, see Forty-Three Cases Cognac Brandy, 14 Fed. Rep. 539, and note; United States v. Leathers, 6 Sawy. 17; United States v. Sturgeon, Id. 29; Kie v. United States, 27 Fed. Rep. 351.

¹⁰¹ Webb v. Nickerson, 11 Oreg. 382, 4 Pac. Rep. 1126.

¹⁰² United States v. 29 Gallons of Whisky, 45 Fed. Rep. 847.

¹⁰³ Act Congr. May 17, 1884, c. 53, § 14, (Supp. to Rev. St. U. S., Edn. 1891, p. 435.)

¹⁰⁴ United States v. Stephens, 12 Fed. Rep. 52.

regarded as superseded by the act of 1884. As the later act "covers the whole ground, the most reasonable conclusion is that it supercedes or repeals all former laws on the subject of intoxicating liquors in Alaska."¹⁰⁵ Under the earlier statute, which made criminal the attempt to introduce such liquors into that district, it was held that a person resident in Alaska, who ordered a hundred gallons of whisky to be shipped to him at Alaska by a wholesale dealer in San Francisco, who had the whisky on hand and for sale, with intent to introduce the same into Alaska, was not guilty of such attempt, because he had done no act to accomplish the illegal intent of which the law would take cognizance, the offer to purchase the liquor, and even the purchase itself, being acts preparatory and indifferent in their character.¹⁰⁶

§ 397. Bell-Punch Law.

The "bell-punch" or "register" is an automatic contrivance for registering the number of drinks sold at a saloon. Its use is enjoined upon all liquor-sellers, in certain of the states, in order that the amount of business done by each may be ascertained and the amount of tax he must pay adjusted accordingly; and it is made a penal offense to sell liquor without registering the sale. The constitutionality of such statutory provisions has been sustained.¹⁰⁷ After the enactment of a statute prescribing the use of such registers, but before the registers are supplied to dealers, one who sells liquor unlawfully is not liable to the punishment denounced by that statute, but only to such punishment as may have been imposed by former revenue laws.¹⁰⁸ An indictment under such statute, for selling a drink of whisky and failing to turn the crank of the proper register, is not supported by proof that the defendant's bar-tender sold the drink in his absence, there being no proof of complicity of the defendant therein.¹⁰⁹

¹⁰⁵ *Nelson v. United States*, 30 Fed. Rep. 112. In this case, the federal circuit court in Oregon examined and sustained the constitutionality of the act of 1884.

¹⁰⁶ *United States v. Stephens*, 12 Fed. Rep. 52.

¹⁰⁷ *Albrecht v. State*, 8 Tex. App. 216.

¹⁰⁸ *Marxhausen v. Comm.*, 29 Gratt. 853.

¹⁰⁹ *Gaiocchio v. State*, 9 Tex. App. 387.

§ 398. Employment of Women in Saloons.

In certain of the states, statutes have been enacted prohibiting the employment of women in drinking-saloons "as waiters or conversationalists." Where the proprietor of a saloon, immediately upon the passage of such a statute, discharged her female employes and then entered into a partnership with them, it was held that this was an indictable infraction of the spirit of the law. And it was further held that there was no misjoinder in not entering a separate indictment for each female employed; and that the indictment need not show that no employe was within the proviso as to a wife or daughter of the employer.¹¹⁰

§ 399. Manufacture of Liquor.

Where the manufacture of malt or spirituous liquors has not been prohibited by legislative enactment, or a license required for such manufacture, or a duty or impost laid thereon, such manufacture is a lawful business and pursuit; and the sale in packages or casks, according to the custom among brewers or distillers, is lawful, for the authority to make implies the authority to sell, unless a legislature shall have expressly enacted to the contrary.¹¹¹ But in those states where the system of prohibition is in force, the manufacture of liquor is not permitted, except by persons who have obtained a permit and who comply with certain conditions. Hence, for example, where the statute prohibits the manufacture of distilled liquor, one may not distill cider brandy, even for his own use or to sell according to law.¹¹² A conviction of a distiller, for making, at his distillery, a sale of spirits which was unlawful when made, is good, although, before the trial, a law was passed authorizing like sales.¹¹³

¹¹⁰ *Walter v. Comm.*, 88 Pa. St. 137. See, also, *Bergman v. Cleveland*, 39 Ohio St. 651; *In re Maguire*, 57 Cal. 604, 40 Am. Rep. 125.

¹¹¹ *Scanlan v. Childs*, 33 Wis. 663.

¹¹² *State v. Lovell*, 47 Vt. 493.

¹¹³ *Acree v. Comm.*, 13 Bush, 353.

§ 400. Being Drunk in a Public Place.

Where the defendant in a criminal prosecution is charged with a violation of a statute providing that "whoever is found in any public place in a state of intoxication shall be fined," etc., it is error to charge that the defendant is not guilty if, under a physician's prescription, he took liquor which caused him in good faith to become intoxicated in a public place.¹¹⁴

§ 401. Distinct Offenses in One Act.

In prosecutions for the violation of the liquor law, where the liquor is furnished in answer to a simple call, at the same time, and by a single act, it can constitute but one act of furnishing, and the party incurs but one penalty, although it may be drunk by more than one person.¹¹⁵ But the retailing of liquors to two distinct persons, though at the same time and place, constitutes two distinct offenses.¹¹⁶ And as each sale of liquor without a license constitutes a distinct and separate offense, different and distinct offenses may be committed by selling to the same persons at different times.¹¹⁷

¹¹⁴ State v. Sevier, 117 Ind. 338, 20 N. E. Rep. 245.

¹¹⁵ State v. Barron, 37 Vt. 57.

¹¹⁶ Comm. v. Dove, 2 Va. Cas. 26.

¹¹⁷ State v. Small, 31 Mo. 197.

CHAPTER XVIII.

ILLEGAL SALES OF LIQUOR AS CRIMINAL OFFENSES.

- § 402. The Offense Statutory.
- 403. What Constitutes a Sale.
- 404. Sales on Credit.
- 405. Devices to Conceal a Sale.
- 406. Sale Distinguished from Gift or Barter.
- 407. Giving Liquor in Kindness or Hospitality.
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- 410. Sale without License not a Continuing Offense.
- 411. Sales Exempted from License Law.
- 412. Unlicensed Sales for Medical Uses.
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- 414. Sales in Prohibited Quantities.
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- 420. Sale to Minor as Agent or Messenger for an Adult.
- 421. Adult "Treating" Minor.
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- 425. What Constitutes Intemperate Habits.
- 426. Seller's Knowledge of Purchaser's Habits.
- 427. Sale of Liquor to Indians.
- 428. Sale of Liquor on Sunday.
- 429. Sunday Sales to Lodgers or Guests.
- 430. Sale of Liquor on Election-Days.
- 431. Sale of Liquor on Public Holidays.
- 432. Sale after Lawful Hours.
- 433. Sales in Prohibited Places.
- 434. Sales Made out of Territory Covered by License.
- 435. Sales near Churches, Schools, Fairs, etc.

§ 402. The Offense Statutory.

If the sale of a quantity of intoxicating liquor, under any circumstances, constitutes a criminal offense, it is because it is prohibited

and made punishable by the terms of a statute. Hence, for example, if the local law provides a penalty for the sale of liquor "as a beverage," an indictment which charges the defendant with selling "maliciously and willfully" does not state an offense; for that is not the crime described in the statute, and the act of selling, as alleged, does not amount to a misdemeanor at common law.¹ On the same principle, if the statute requires each "dealer" in liquors to pay a tax to the state, the act of making a single sale of an entire stock of liquors, without paying the tax, is not a violation of the law; for "a 'dealer' is one who makes successive sales as a business."² It is a general rule, therefore, that if a sale of intoxicating liquor is made the basis of a prosecution, the act complained of must be shown to be within the specific terms of some valid and operative statute. While the laws prohibiting sales of intoxicants under particular circumstances, or for particular purposes, cannot constitutionally apply to transactions completed before their passage, and which were innocent at the time, there is no reason why they should not prevent the future sale of property already in existence when they were enacted.³

§ 403. What Constitutes a Sale.

In most, if not all, of the states, the statutes prohibit the "sale" of intoxicating liquors under certain circumstances. At first sight, it appears that there should be no difficulty in construing and applying this term. But there are a great variety of cases in which the property and possession of liquors are transferred from one person to another, which do not come within the legal and technical meaning of the word "sale," and yet are obviously within the mischiefs intended to be remedied by the statute. In such instances, if the statute in terms specifies no other kinds of transfer than sale, the courts are confronted with embarrassing questions. And in numerous cases they have chosen to carry out the presumed intention of the legislature, by sustaining convictions on evidence of any transfer

¹ State v. Hafsoos, (S. Dak.) 47 N. W. Rep. 400.

³ Stickrod v. Comm., 86 Ky. 285, 5 S. W. Rep. 580.

² Overall v. Bezeau, 37 Mich. 506.

of the prohibited commodity for value, though at the expense of distorting the familiar legal term beyond recognition. Thus, in Massachusetts, it has been held that a delivery of beer upon an agreement, express or implied, that other beer should be returned in payment for it, constitutes a sale of the liquor;⁴ and that an exchange of intoxicating liquors, by a distiller, for grain from which to distill such liquor, is a sale, whether the liquor is delivered at the time of receiving the grain or afterwards;⁵ and also that a delivery and receipt of such liquor, as payment for services performed, may be treated as a sale for the purposes of the statute.⁶ And in another state we find the remarkable ruling that a delivery of whisky as compensation for the use of a buggy, in performance of an agreement so to do, is a sale of the whisky.⁷ We think these decisions cannot be sustained on principle. "Sale," we are told, "is a word of precise legal import, both at law and in equity. It means, at all times, a contract between parties to give and to pass rights of property *for money*, which the buyer pays or promises to pay to the seller for the thing bought and sold."⁸ And where the legislature has used a word of precise legal import, and has forbore to use other legal and technical terms, which might have been used, and which would be exactly descriptive of other well-known varieties of transfer of property, then,—having due regard to the rule that penal statutes are to be construed strictly, and to the rule that technical terms are to be understood in their technical sense, and to the maxim *expressio unius est exclusio alterius*,—it is difficult to see any justification for the courts in adding to the enacted law by making the word "sale" include barter, gifts, and the payment of hire or wages in liquor. Other cases which have arisen under statutes of this character have presented less difficulty. Thus, it is held that a recovery in trespass of the value of liquors, held for unlawful sale, transfers the title to them to the defendant

⁴ Comm. v. Abrams, 150 Mass. 393, 23 N. E. Rep. 53.

⁵ Comm. v. Clark, 14 Gray, 367.

⁶ Mason v. Lothrop, 7 Gray, 354. If a person has taken liquor in payment for work done, in the absence of any prior agreement to do the work for the liq-

uor, there may be some reason for holding the transaction a sale. Bescher v. State, 32 Ind. 480.

⁷ Paschal v. State, 84 Ga. 326, 10 S. E. Rep. 821.

⁸ Williamson v. Berry, 8 How. 495, 544.

by the mere operation of law, and does not constitute a sale "by any person or persons," within the prohibition of the statute.⁹ So the administering of liquors, as a medicine, to a patient by a physician, could not properly be denominated a sale.¹⁰ So, where a minor had in his possession two pool-checks, which the defendant had sold to some one else for a price, redeemable in beer at the bar, and the minor exchanged the checks for beer, it was held to be no evidence of a sale to the minor.¹¹ But on the other hand, where one receives sundry drinks of liquor in payment of a certain sum, under an agreement that the seller shall have credit for each drink, and so on until the debt is satisfied, it is a violation of the statute.¹²

It is not necessary, to constitute a sale of liquor under the statute, that the liquor should be the only article transferred between the parties, or that the price paid for it should be severable from that paid for other commodities included in the same purchase.¹³ And the offense is complete when the vendor delivers the liquor, although the purchaser does not drink nor intend to drink the entire glass; his motive in buying the liquor, and the disposition he makes of it, are alike immaterial.¹⁴

As to the character of the vendor, it is not necessary that the person prosecuted for the act of selling should have owned the liquor, or have had the authority from the owner to sell it.¹⁵ And one who receives money and delivers liquor therefor may be treated as the seller, if no other person filling that character in the transaction is pointed out by the evidence.¹⁶ Conversely, if a customer helps himself to goods in a store, and places the price within reach of the salesman, and he receives it and puts it with the money of the owners, that is a sale by the owners, if they assent.¹⁷ So an express agent

⁹ *Hamilton v. Goding*, 55 Me. 419.

¹⁰ *Schaffner v. State*, 8 Ohio St. 642.

¹¹ *Massey v. State*, 74 Ind. 368.

¹² *State v. Poteet*, 86 N. Car. 612.

¹³ *Comm. v. Worcester*, 126 Mass. 256.

¹⁴ *Dillman v. People*, 4 N. Y. Week. Dig. 251; *Comm. v. Geary*, 146 Mass. 139, 15 N. E. Rep. 363.

¹⁵ *State v. Wadsworth*, 30 Conn. 55.

¹⁶ *Paschal v. State*, 84 Ga. 326, 10 S. E.

Rep. 821. In a prohibition county, one who receives money from another with a request to procure whisky, and who shortly afterwards delivers the whisky, may be treated as the seller, if no other person filling that character appears, and it is not shown where, how, or from whom the whisky was obtained. *Grant v. State*, (Ga.) 13 S. E. Rep. 554.

¹⁷ *State v. Wiggin*, 20 N. H. 449.

who receives a C. O. D. package, known by him to contain intoxicating liquor, is criminally guilty of selling when he delivers the package, receives the price, and transmits it to the consignor.¹⁸ And under a statute imposing a fine upon "any person who, without a license therefor, shall, by sample, by soliciting or procuring orders, or otherwise, sell" intoxicating liquors, a commercial traveler for a firm in another state, who merely takes an order from a dealer in the state of the forum, and forwards it to his firm, who deliver the liquor in their state, is guilty of an offense.¹⁹

§ 404. Sales on Credit.

On the trial of an indictment for unlawfully selling liquor, an actual delivery of the liquor must be proved, and evidence of a mere agreement to sell is not sufficient. But it is not necessary to aver or prove that the liquor was paid for; because a sale on credit is as much a violation of the law as a sale for cash.²⁰ And "the inability of the seller to coerce payment by legal process does not, in contemplation of the statute, so far change the character of the transaction as to prevent it from being considered a sale. It is not a gift, for there is an expectation that the price will be paid."²¹ Hence it is not necessary, to consummate the sale, that the liquor should be handed out in response to a call for it, or that it should be paid for by, or charged to, some person, if there was an understanding or expectation of payment.²² So, one playing a game with three persons who severally lose, under an agreement that each loser shall treat, is liable for three distinct sales, if he furnishes the liquor for the treats, although no settlement or payment is made until the playing is con-

¹⁸ State v. Goss, 59 Vt. 266, 9 Atl. Rep. 829, 59 Am. Rep. 706.

¹⁹ State v. Ascher, 54 Conn. 299, 7 Atl. Rep. 822. In this case, Carpenter, J., said: "The word 'sell' is used in the same sense in which it is generally used by business men in relation to this subject-matter. In common language, a drummer *sells* goods; he *sells* by sample; he *sells* by soliciting and procuring

orders; the dealers *sell* by drummers as their agents."

²⁰ Riley v. State, 43 Miss. 397; Comm. v. Burns, 8 Gray, 482; State v. Greenleaf, 31 Me. 517; Emerson v. Noble, 32 Me. 380; Perkins v. State, (Ala.) 9 South. Rep. 536.

²¹ Emerson v. Noble, 32 Me. 380.

²² Kimball v. People, 20 Ill. 348.

cluded.²³ And under a statute which prohibits the selling, bartering, or disposing of, intoxicating liquors, it is held that if one sells liquor, it is not material whether it is paid for at all. It would not be a violation of the statute for one to give away liquor without any expectation of compensation. But if there is an understanding, express or implied, that the party who obtains the liquor will pay for it, or will purchase something else because of it, the act is disposing of the liquor within the meaning of the statute.²⁴

§ 405. Devices to Conceal a Sale.

In any case where a sale or gift of liquor would be contrary to law, the courts will refuse to countenance any trick, artifice, or subterfuge intended to evade the law. However the parties may disguise or conceal the transaction, whatever verbal or circumstantial device they may employ to cloak the real purpose, it is enough to sustain a conviction if liquor was actually sold or given in violation of the law or evasion of its terms.²⁵ Thus, a device by which one pretends to sell, and the other to buy, turpentine, when whisky is in fact intentionally sold, is not effective as an evasion of the law.²⁶ So, where the defendant kept cigarettes for sale, and invited purchasers of them to drink whisky with him, it was held that if the price asked for the cigarettes was intended to cover the price of the whisky, which was afterwards nominally given to the purchaser, the transaction was a sale of the whisky as well as of the cigarettes.²⁷ So a defense that the prisoner, who was a butcher, sold some beef to the complaining witness, and gave him some whisky without compensation, is not sustained where the evidence shows that the witness applied to buy whisky and not beef, and that the latter article was not worth the money paid, and was not delivered at the time.²⁸ On the same principle, it is a question of fact for the jury whether the giving away of liquor by a grocer,

²³ *Comm. v. Hogan*, 97 Mass. 120.

²⁴ *State v. Cutting*, 3 Oreg. 260.

²⁵ *Looney v. State*, 43 Ark. 389; *Rabe v. State*, 39 Ark. 204; *Archer v. State*, 45 Md. 33; *Comm. v. Thayer*, 8 Metc.

(Mass.) 525; *State v. McMinn*, 83 N. Car. 668.

²⁶ *Looney v. State*, 43 Ark. 389.

²⁷ *Archer v. State*, 45 Md. 33.

²⁸ *Marcus v. State*, 89 Ala. 23, 8 South. Rep. 155.

alleged to be with a view to increase his custom for groceries, is or is not a mere device to evade the liquor law.²⁹ In one of the cases, the evidence showed that defendant had a room, wherein was a table with a hole in the top, and a vessel on it containing liquor; that at sundry times the witness went into the room, poured out a drink of liquor, and, having drunk it, dropped some money, at the rate of five cents for a drink, into the hole; that defendant was present, and nothing was said by him or by the witness. It was held that the court rightly charged that, if the jury should believe from the testimony that the liquor was the property of the defendant, and that he received the money put into the hole by the witness as payment therefor, and that this was a device to evade the statute against retailing, the defendant was guilty.³⁰ So, where two persons went into a room above a saloon, and placed ten cents each on a dumb-waiter, and stepped into an adjoining room for a few minutes, and when they came back they found two glasses of beer and some cigars on the waiter and the money gone, and they drank the beer, it was held a joint sale of the beer.³¹ But if the witness merely helped himself to the liquor and left some money, and it is not shown that the defendant was present, or knew of it, or received the money, there is not enough to convict.³² And in a case where the defendant took some whisky from his wagon and gave to certain persons, saying that he had some for his friends but not for sale, and the drinkers threw some money on to the wagon-seat, but did not see defendant take it, it was held that a verdict for defendant should not have been set aside.³³

§ 406. Sale Distinguished from Gift or Barter.

Inasmuch as sale, which means a transfer of property for a price in money, is an entirely different thing from a gift, which signifies a gratuitous transfer without an equivalent, it follows that if the statute prohibits merely the sale of liquor, to give it away is not an indict-

²⁹ *Kober v. State*, 10 Ohio St. 444.

³⁰ *State v. McMinn*, 83 N. Car. 668.

³¹ *Henry v. State*, 113 Ind. 304, 15 N.

E. Rep. 593.

³² *State v. Ferrell*, 22 W. Va. 759.

³³ *State v. Cooper*, 26 W. Va. 338.

able offense. And under an indictment which charges a sale, if the evidence shows merely a gift, there can be no conviction.³⁴ For example, testimony of a witness that he had called for liquor at a public-house kept by defendant, and that a waiter, by defendant's order, delivered it to him; that the witness never paid the defendant or the waiter; that he offered to pay, but defendant declined to take anything, is no evidence of a sale of the liquor.³⁵ And conversely, evidence to prove a sale, or from which a sale may be inferred, will not sustain a conviction upon a charge of giving away liquor.³⁶ And what is true of the distinction between a sale and a gift is equally true of the distinction between a sale and a barter. An indictment for selling liquor unlawfully is not sustained by evidence which establishes a barter or exchange.³⁷ If the terms of the statute are broader than those above indicated, different questions will arise. Thus, in Oregon, under a statute providing that no person should "barter, sell, or dispose of in any manner, any spirituous liquors," etc., it has been held error to instruct the jury that if the liquor was given gratuitously, it would sustain the indictment equally as if it had been sold and paid for.³⁸ Perhaps this decision may be sustained on the theory that the "disposing" intended by the statute is a disposing analogous to a sale or exchange, that is, for a valuable equivalent. But an opposite conclusion has been reached by the court in Minnesota.³⁹ In some other states, the statute uses the comprehensive expression "sell or furnish." And it is held that a conviction may be had for furnishing liquor unlawfully, although the facts do not show a sale, or do show a gift.⁴⁰

³⁴ *Siegel v. People*, 106 Ill. 94; *Young v. State*, 58 Ala. 359; *Williams v. State*, (Ala.) 8 South. Rep. 668; *Stevenson v. State*, 65 Ind. 409; *Holley v. State*, 14 Tex. App. 505; *Gillan v. State*, 47 Ark. 555, 2 S. W. Rep. 185; *State v. Briggs*, (Iowa,) 47 N. W. Rep. 865; *McGruder v. State*, 83 Ga. 616, 10 S. E. Rep. 281. In Indiana, it is held that the question, whether intoxicating liquor, delivered by an unlicensed saloon-keeper to one who received and drank it, was intended by the parties to be the subject of a

sale or of a gift, is a question of fact to be determined by all the evidence. *Keiser v. State*, 82 Ind. 379.

³⁵ *Comm. v. Packard*, 5 Gray, 101.

³⁶ *Harvey v. State*, 80 Ind. 142.

³⁷ *Gillan v. State*, 47 Ark. 555, 2 S. W. Rep. 185; *Stevenson v. State*, 65 Ind. 409.

³⁸ *Wood v. Territory*, 1 Oreg. 223.

³⁹ *State v. Deusting*, 33 Minn. 102, 22 N. W. Rep. 442, 53 Am. Rep. 12.

⁴⁰ *Dukes v. State*, 77 Ga. 738; *State v. Freeman*, 27 Vt. 520.

§ 407. Giving Liquor in Kindness or Hospitality.

The provisions of the liquor laws being aimed at the suppression of an illicit or injurious traffic in intoxicants, it is considered that a person is not liable to indictment for furnishing liquor to a friend or guest, at his private residence, as an act of kindness or hospitality.⁴¹ On a similar principle, where an innkeeper gratuitously furnished whisky at his bar to his domestic servant, who had been sitting up late at night in the performance of his duties, it was held that this was not a violation of the statute.⁴² But as doubts have sometimes arisen as to whether such cases might not come within the terms of some of the more stringent and comprehensive statutes, the legislatures in some of the states have made express exceptions in favor of those who might supply liquor to their friends, not in the way of business, but in the spirit of hospitality. Thus, in Kentucky, there is a proviso that the act shall not apply to those who give or furnish liquor to their invited guests at their own households. And in a case where the defendant invited an acquaintance into his house three or four times, and there gave him a drink of liquor; and on a few occasions he invited another acquaintance, who was working for him, when in his house, to take a drink, and occasionally the party suggested it himself; and all the drinking was done in the family room, and while the parties were there by the defendant's request; it was held that this came within the proviso.⁴³ In Vermont, the statute contains a proviso that "the words 'give away,' where they occur in this chapter, shall not apply to the giving of intoxicating liquor at private dwellings or their dependencies, unless given to an habitual drunkard, or unless such dwelling or its dependencies become a place of public resort." But it is ruled that a person who gives away liquor in a room in which no business is conducted, but which is not his

⁴¹ Reynolds v. State, 73 Ala. 3; Albrecht v. People, 78 Ill. 510; State v. Standish, 37 Kans. 648, 16 Pac. Rep. 66.

⁴² State v. Jones, 39 Vt. 370. But the gratuitous furnishing of intoxicating liquor to musicians employed by the

innkeeper on the occasion of a dance at his house, was held to be an offense under the statute. Id.

⁴³ Powers v. Comm., (Ky.) 13 S. W. Rep. 450.

dwelling, violates the statute.⁴⁴ In Iowa, it is no offense to give liquor to an adult person, who is not intoxicated nor in the habit of becoming so, when such gift is without consideration received or expected in return, and without subterfuge or attempt to evade the provisions of the statute.⁴⁵

§ 408. Acting as Agent for Buyer.

In prosecutions under the liquor law, a defense is sometimes interposed to the effect that the prisoner was not the seller of the liquor, but merely acted as the agent or intermediary of the buyer. This always raises a question of fact, which must be determined from the whole evidence. It is said that mere proof of the procurement and delivery of liquor by one person to another at the latter's request, is no evidence of an unlawful sale.⁴⁶ And in a case where the evidence was that the witness applied for liquor to the defendant, who told him he could not get it unless he had a bottle, whereupon the witness furnished him a bottle, and after a short absence he returned with the liquor, and told the witness he should have to ask him a small sum for getting it, which was paid, it was held that the jury had a right to consider the hypothesis that the transaction might have been in good faith, the defendant acting as the agent of the witness in making the purchase, and that it was error to instruct them to find the defendant guilty if they believed the evidence.⁴⁷ The fact that one is a grocer raises no presumption of wrong-doing against him in his purchasing a barrel of whisky for a customer, and charging for it what he paid.⁴⁸

§ 409. Sale of Liquor without License.

When the liquor-statutes of a given state provide a system of granting licenses, and prohibit all persons from selling intoxicants without procuring such license, under penalty of being guilty of a misde-

⁴⁴ State v. Danforth, (Vt.) 19 Atl. Rep. 229.

⁴⁷ State v. Taylor, 89 N. Car. 577.

⁴⁵ State v. Hutchins, 74 Iowa, 20, 36 N. W. Rep. 775.

⁴⁸ United States v. Howell, 20 Fed. Rep. 718. Compare State v. Buck, 37 Vt. 657.

⁴⁶ State v. Thomas, 13 W. Va. 848.

meanor, the obtaining of a license is an absolute prerequisite to the right to sell; no substitute for it will avail, and no excuse for a failure to obtain it will be heard. If no licenses whatever were granted in a given district, any person who sells liquor in that district is indictable. And it is of no consequence for what reason the licenses were refused, or whether the withholding of them was rightful or wrongful.⁴⁹ So where a local option law is submitted to the popular vote, after a town has voted against license, an indictment may be found for selling in the town without license.⁵⁰ And although the town has voted in favor of license, that will not justify a person in selling until he has proceeded to take out a license; nor is the liability of such person affected by the fact that the county commissioners of the county in which the sale is made refuse to grant license to any person whatever to sell liquor in towns which have not voted against license.⁵¹ And the repeal of a licensing law takes away all the rights of the holders of existing and unexpired licenses, so that thereafter they are indictable for selling, unless they comply with the new law.⁵² And a law requiring a license applies to sales of liquor owned by the seller at the time of its passage.⁵³ But the statutory offense of selling liquor without a license is not committed by a mere bargain for a sale. To constitute the offense, there must be a completed sale which passes the property.⁵⁴ But it is not necessary that the liquor should be the only article bought and sold between the parties in the same transaction, or that it should be charged for in a sum distinct and severable from the price paid for other things purchased at the same time. A keeper of a restaurant, who has no retail license, who sells wine only to persons taking meals at his restaurant, the liquor being drunk by them only while eating, is guilty of an indictable offense.⁵⁵ And that the defendant supposed the liquor for the sale of which he is prosecuted to have been a beverage of

⁴⁹ *Comm. v. Frantz*, 135 Pa. St. 389, 19 Atl. Rep. 1025; *Beckham v. Howard*, 83 Ga. 89, 9 S. E. Rep. 784. And see, *supra*, §§ 119-121.

⁵⁰ *State v. Funk*, 27 Minn. 318, 7 N. W. Rep. 359.

⁵¹ *State v. Cron*, 23 Minn. 140.

⁵² *State v. Mullenhoff*, 74 Iowa, 271, 37 N. W. Rep. 329.

⁵³ *Comm. v. Logan*, 12 Gray, 136.

⁵⁴ *Bancher v. Warren*, 33 N. H. 183.

⁵⁵ *Nicrosi v. State*, 52 Ala. 336; *Comm. v. Everson*, 140 Mass. 292, 2 N. E. Rep. 839.

a different character, not intoxicating, is no defense.⁵⁶ And the fact that the sales were made in violation of the Sunday law is no defense to a prosecution for selling without a license.⁵⁷ The expiration of a license by lapse of time, or its revocation for cause, will of course annul all rights formerly held under it, and will expose the dealer to the penalties for unlicensed selling, if he continues the business. In Maryland, the law allows a trader, closing his business after the expiration of his license, to sell his old stock of liquors without renewing his license. But this does not authorize him to sell the same in small quantities at retail. He may dispose of the stock at public auction, or at private sale, if by wholesale at one time in good faith, solely for the purpose of closing his business and not in the continued prosecution of it.⁵⁸

§ 410. Sale without License not a Continuing Offense.

We have seen that the authorities hold that proof of a single sale of intoxicating liquor is not sufficient to charge the party with the offense of "engaging in," "pursuing" or "carrying on, the business of" a liquor-seller, unless, perhaps, where it is coupled with proof of an intent to continue the traffic; in general, a greater number of sales than one must be shown in order to secure a conviction.⁵⁹ But where the statute provides that no person shall "sell intoxicating liquors" without a license, it describes an offense which may be committed by a single act, and which is not a continuing offense, in any such sense that a repetition of the act or an intention to repeat it is an essential element of the crime. Consequently, under such a statute, a single sale of liquor, made without the protection of a license, constitutes the offense and will sustain a conviction.⁶⁰

⁵⁶ *Comm. v. Daly*, 148 Mass. 428, 19 N. E. Rep. 209.

⁵⁷ *O'Brien v. State*, (Ala.) 8 South. Rep. 560.

⁵⁸ *Forwood v. State*, 49 Md. 531.

⁵⁹ *Blackwell v. State*, 45 Ark. 90; *Miller v. State*, 3 Ohio St. 475; *Merritt v. State*, 19 Tex. App. 435; *Halfin v. State*, 18 Tex. App. 410; *Bryant v. State*, 46

Ala. 302; *Moore v. State*, 16 Ala. 411; *Ramsey v. State*, 11 Ark. 35. *Supra*, § 386.

⁶⁰ *State v. Chandler*, 15 Vt. 425; *State v. Bugbee*, 22 Vt. 32; *State v. Paddock*, 24 Vt. 312; *State v. Cassety*, 1 Rich. 90; *State v. Glasgow*, Dudley, 40; *Frese v. State*, 23 Fla. 267, 2 South. Rep. 1; *Dansey v. State*, 23 Fla. 316, 2 South. Rep.

§ 411. Sales Exempted from License Law.

The license laws of the various states frequently contain provisions exempting from their terms persons who raise fruit and manufacture wine or cider on their own property. Thus, in Missouri, a wine-grower is not indictable for selling wine on his own premises without a license, or for permitting it to be drunk at such place.⁶¹ So, in Massachusetts, the statute exempts from its provisions "sales of cider by the makers thereof," and it is held that the maker of cider does not put himself outside the exemption because he did not himself raise all the apples from which the cider was made, or because he had the cider made at a neighbor's mill.⁶² In another state, a similar exempting clause is held to exempt the manufacturer of wine from the penalty for keeping a drinking-saloon or dram-shop without license, as well as from the penalty for selling without license.⁶³ In North Carolina, the law provides that "nothing in this section contained shall prevent any person from selling wine of his own manufacture at the place of manufacture, or any person from selling spirits or wine, the product of his own farm, in quantities not less than one quart." Under this act, it is held that a person within the exemption may make his sales by an agent acting as such in good faith.⁶⁴

§ 412. Unlicensed Sales for Medical Uses.

In a prosecution for an illegal sale of liquor, it is not a valid defense that the liquor was sold solely for a medical purpose, even on the prescription of a physician, and was so used, if the defendant had no license to sell, except when the statute makes an express saving in favor of such sales.⁶⁵

692; *Kansas City v. Muhlback*, 68 Mo. 698; *People v. Kropp*, 52 Mich. 582, 18 N. W. Rep. 368.

⁶¹ *State v. Jaeger*, 63 Mo. 403.

⁶² *Comm. v. Mahoney*, (Mass.) 25 N. E. Rep. 893.

⁶³ *Jeffries v. State*, 52 Ark. 420, 12 S. W. Rep. 1015.

⁶⁴ *State v. Hart*, 107 N. Car. 796, 12 S. E. Rep. 378. Tolls earned by a grist-mill situated on a farm are not products of the farm. *State v. Patterson*, 98 N. Car. 657, 4 S. E. Rep. 47.

⁶⁵ *State v. Brown*, 81 Me. 522; *Comm. v. Kimball*, 24 Pick. 366; *Leppert v.*

§ 413. Sale for Purposes not Authorized by License.

A license to sell liquors for certain purposes, specified in the act under which it is issued, cannot protect the holder thereof from criminal prosecution if he violates the laws of the state by selling for other purposes.⁶⁶ Thus, a sale of liquors made by a person licensed to sell "for medicinal, mechanical, and chemical purposes," is illegal if made for any other purpose.⁶⁷ And so, under the system by which town agents are appointed for the sale of liquor, such an agent is not authorized to make sales, except upon an application for a lawful purpose, and upon a representation reasonably inducing the belief that it is wanted for such purpose only. And if such an agent sells liquor without such an application and representation, and without any inquiry, and in fact the liquor is wanted and used for drink, and not for a lawful purpose, he is guilty of a violation of the law, as much as if he were not agent.⁶⁸ Where sales of intoxicating liquor by the agent of one holding a permit are shown, the burden of showing that the sales were for authorized purposes is upon the defendant.⁶⁹ Where the statute expressly excepts from its provisions physicians putting up their own prescriptions, it is a good defense that the liquor was sold and administered in good faith as a medicine, and whether the defendant is a physician authorized to practice medicine under the laws of the state is a question of fact for the jury.⁷⁰ A physician is not guilty of a violation of a statute which prohibits the selling of liquor within a certain district, but allows physicians to keep and prescribe it as a medicine, where he sells it for that purpose, although he fails to record the prescription in a book as required by the act.⁷¹

State, 7 Ind. 300; State v. Thornburg, 16 S. Car. 482.

⁶⁶ State v. Perkins, 26 N. H. 9.

⁶⁷ Adams v. Hackett, 27 N. H. 289, 59 Am. Dec. 376.

⁶⁸ State v. Fisher, 35 Vt. 584; State v. Parks, 29 Vt. 70.

⁶⁹ State v. Kriechbaum, (Iowa,) 47 N. W. Rep. 872.

⁷⁰ State v. Young, 36 Mo. App. 517.

⁷¹ Sarrls v. Comm., 83 Ky. 327.

§ 414. Sales in Prohibited Quantities.

The statutes commonly provide that wholesalers, or persons who are not licensed at all, shall not sell liquor in quantities less than a prescribed amount, or that liquor shall not be sold to be drunk on the premises in less than a certain quantity. And it may be regarded as a settled rule that although the quantity bargained for, sold, and paid for, may be greater than the statutory minimum, yet if only a portion of it is delivered at the time, and the rest is to be subject to the buyer's call, remaining, in the mean time, in the same cask or barrel and not separated from the other liquor, then the seller may be indicted for the sale of that portion which was delivered to the purchaser, if that is within the statute.⁷² But if the liquor sold is *separated* from the bulk out of which it is drawn, the seller is not liable to prosecution, even though the liquor is not paid for by the purchaser at the time, but is charged as a sale on account, and though the purchaser takes away less than the statutory minimum, leaving the remainder, so separated, subject to his order.⁷³ In a case where the defendant sold beer, aggregating several gallons, to a person who directed him to "set up the beer" to a crowd of persons, each of whom drank the same in glasses holding a pint, it was held that this would warrant a conviction under an indictment charging a sale in quantities less than one quart.⁷⁴ And so, if two persons go together to a saloon, and each asks for half a pint of liquor, which is delivered to each one in his separate bottle, it is a separate sale of liquor to each, although one, at the request of the other, pays for both.⁷⁵ But on the other hand, where A., wanting a pint of whisky, tried to buy it from B., who, not having any, and wanting some for himself, took from A. the price of a pint, added thereto enough to make the price of a gallon, bought a gallon from C. with the money, and let A. have a pint of it, it was held that this was not a violation

⁷² *Murphy v. State*, 1 Cart. (Ind.) 366; *Thomas v. State*, 37 Miss. 353; *State v. Kirkham*, 1 Ired. 384; *Richardson v. Comm.*, 76 Va. 1007; *Tripp v. Hennessy*, 10 R. I. 129.

⁷³ *Dobson v. State*, 57 Ind. 69. See, also, *State v. Bell*, 2 Jones. (N. Car.) Law, 337.

⁷⁴ *Klein v. State*, 76 Ind. 333.

⁷⁵ *Comm. v. Very*, 12 Gray, 124.

of the law forbidding the sale of whisky in quantities less than one gallon, as it was a joint purchase, and not a sale by B. to A.⁷⁶ Further, if several different kinds of liquor are sold to the same purchaser at the same time, it is immaterial that the quantity sold of each kind is less than the statutory minimum, if the entire purchase aggregates more than that quantity.⁷⁷ As to the distinction between a wholesale and retail dealer, the limit of quantity which separates the two classes is generally defined in the statute, or is to be determined from its terms. It has been held that a sale, by one not a manufacturer, of twenty-five quarts of beer, put up in quart bottles, to be drunk by the purchaser, is a sale at retail.⁷⁸

§ 415. Sale of Liquor to Minors.

Most of the states, if not all, moved by the same considerations of public interest, have enacted statutes prohibiting the sale of intoxicating liquors to minors. As the object of these laws is to avert the demoralization and injury to the youth of the community which would surely result if the saloons were freely open to them, it has been thought that their language should be so restricted as to apply only to sales of liquor to such persons in small quantities for tipping purposes. In this view, a sale at wholesale, to a minor who is engaged in business as a merchant, would not be within the meaning or intent of the statute.⁷⁹ The term "minor," it will be remembered, always designates a person under the age of twenty-one years, unless the local statute fixes a different age for majority. And an infant, whose civil disabilities as such have been removed by a decree in chancery, is still a minor within the meaning of the statute prohibiting sales of intoxicating liquor.⁸⁰

⁷⁶ *Johnson v. State*, 63 Miss. 228.

⁷⁷ *Browne v. Hilton*, 23 Pick. 319;
Cobb v. Billings, 23 Me. 470.

⁷⁸ *Kaufmann v. Village of Hillsboro*, 45 Ohio St. 700, 17 N. E. Rep. 557. See *Maxwell v. State*, 27 Ala. 660; *Lillensteine v. State*, 46 Ala. 498. And see, *supra*, § 23.

⁷⁹ *Brose v. State*, 5 Ind. 75. But see *Pounders v. State*, 37 Ark. 399.

⁸⁰ *Coker v. State*, (Ala.) 8 South. Rep. 874. A statute prohibiting the sale of liquor to "any student of the state university, or of any school, college, or academy," is not restricted to sales to such students as are minors. *State v. Cooper*, 35 Mo. App. 532.

The terms of the statutes on this subject, in the various states, are not uniform. And unless the language used is of the most comprehensive description, it is not every act by which a minor is supplied with liquor that will constitute a punishable offense. Thus, if the law goes no further than to forbid the *sale* of intoxicants to a minor, this will not cover the case of a *gift* of liquor.⁸¹ And on the same principle, neither selling nor giving is included in a case where the transaction is shown to have been a barter or loan.⁸² But if the terms of the act are broad enough, a gratuitous supplying of liquor to a minor is an indictable offense.⁸³ And in some jurisdictions, the law uses the very general expression "furnishing" liquor, the construction of which term has been involved chiefly in cases where the liquor was purchased by a third person and handed to the minor at his direction,—cases which will be examined in a later section.

Though prosecutions under these statutes are usually directed against dealers in liquor, it is not an essential element of the offense that the seller should be engaged in that business. And if the statute makes it an offense for "any person" to sell liquor to a minor, it is immaterial whether the defendant is a liquor-seller or not, or whether he is licensed or not.⁸⁴ If he holds a license for the sale of liquors, that is no protection to him in selling to classes of persons to whom the law forbids sales to be made.⁸⁵ And if he does not hold a license, he commits two offenses, and is liable to two prosecutions, in and for the same act; viz., selling liquor to a minor and selling liquor without a license.⁸⁶ It is even held that a practising physician, who brings himself within the definition of a "dealer" by keeping liquor on hand "for the purpose of sale or profit," is guilty of a violation of the statute if he prescribes liquor for a minor, knowing him to be such, although the liquor is such as, in his judgment, the

⁸¹ Ward v. State, 45 Ark. 351; Siegel v. People, 106 Ill. 89.

⁸² Gillan v. State, 47 Ark. 555, 2 S. W. Rep. 185; Cooper v. State, 37 Ark. 412; Coker v. State, (Ala.) 8 South. Rep. 874. *Supra*, § 406.

⁸³ Simons v. State, 25 Ind. 331.

⁸⁴ State v. McGinniss, 30 Minn. 48, 52, 14 N. W. Rep. 256, 258; Parkinson v. State, 14 Md. 184, 74 Am. Dec. 522; State v. Hamilton, 75 Ind. 288.

⁸⁵ *Supra*, § 151.

⁸⁶ Blair v. State, 81 Ga. 628, 7 S. E. Rep. 855.

minor ought to take as a medicine, and thereupon sells or gives him the same.⁸⁷

The ownership of the liquor given to a minor, it is said, is immaterial. It is the voluntary delivery into the possession of a minor, with or without anything being given in consideration, that the statute denounces and punishes.⁸⁸ And the doctrine of the responsibility of a master or principal for sales to minors made by his servant or agent is settled in accordance with the general principles which we have already discussed in detail. That is, the master is criminally liable if the sale was made in his presence, or with his knowledge and consent, or by his direction or authorization; but otherwise if made without his knowledge or consent, express or implied, or in disobedience to his orders given in good faith.⁸⁹ As already intimated, several distinct offenses may be involved in the same act of furnishing liquor to a minor. Thus, besides the misdemeanor determined by the minority of the purchaser, there may be the offense of selling liquor without license, or of selling on Sunday, or of selling liquor to be drunk on the premises. And under the statute in Massachusetts, it is held that a person may be liable to the several penalties prescribed for selling to a minor, giving liquor to him, and allowing him to loiter on the premises, on the same occasion.⁹⁰ But the supplying of liquor to a minor is not made a misdemeanor in all the states. In some jurisdictions, the penalty prescribed is the forfeiture of a sum of money, to be recovered in a civil action. In those states, therefore, the act is not an indictable offense.⁹¹

§ 416. Knowledge of Minority as a Statutory Element of the Offense.

In prosecutions for illegal sales of liquor to minors, the defense most usually set up is ignorance or mistake of fact as to the age of

⁸⁷ State v. McBryer, 98 N. Car. 619, 2 S. E. Rep. 755.

⁸⁸ Hill v. State, 62 Ala. 168.

⁸⁹ *Supra*, §§ 368-373. And see People v. Riley, 71 Mich. 349, 38 N. W. Rep. 922; Loeb v. State, 75 Ga. 258; O'Flinn

v. State, 66 Miss. 7, 5 South. Rep. 390; Ihrig v. State, 40 Ind. 422; State v. Chastain, 19 Oreg. 176, 23 Pac. Rep. 963.

⁹⁰ McNeil v. Collinson, 130 Mass. 167.

⁹¹ State v. Amor, 77 Mo. 568; State v. Slaughter, 17 Mo. App. 142. See State

the purchaser. The general question of the availability of such a plea is one which has provoked much discussion and given rise to many conflicting rulings. This question we propose now to examine in detail. And first, we must direct the learned reader's attention to the cases where the statute defines the offense as *knowingly* selling intoxicating liquor to a minor. Here the knowledge of the seller is an essential element of the offense, and it must be proved, either by direct or circumstantial evidence, that when the defendant sold the liquor he knew that the purchaser was a minor.⁹² But the defendant is not protected by his ignorance, if such ignorance was the result of carelessness or indifference. In other words, he is chargeable with such knowledge as would have come to him if he had exercised proper prudence and diligence. What facts would constitute such diligence is a question for the jury and not for the court. And hence it is error to instruct the jury that simply to ask the minor whether he was of age would not be the diligence required of defendant by law.⁹³ Nor should the jury be instructed to judge from the appearance of the minor, as seen by them, whether the defendant had sufficient reason to believe that he had attained the age of twenty-one years.⁹⁴ Neither should witnesses be permitted to testify that it was reasonably apparent to the observation of a prudent man that the purchaser was not of age.⁹⁵ And it is error to permit a witness to be asked whether, at the time of the offense, the purchaser, by reason of his physical appearance, would be taken by a person of ordinary observation to be a minor.⁹⁶ The proper question is not how the appearance of the person would impress the average man, or the ordinary observer, or the prudent man, but how it did impress the witness. Hence the witness may be allowed to state that, from the

v. Dupuis, 18 Oreg. 372, 23 Pac. Rep. 255.

⁹² Hunter v. State, 18 Tex. App. 444, 51 Am. Rep. 319; Williams v. State, 23 Tex. App. 70, 3 S. W. Rep. 661; Perry v. Edwards, 44 N. Y. 223. See State v. McBryer, 98 N. Car. 619, 2 S. E. Rep. 755. Evidence that the minor generally circulated the report that he was of age is admissible to show defendant's want

of knowledge. Pressler v. State, 13 Tex. App. 95.

⁹³ McGuire v. State, (Tex. App.) 15 S. W. Rep. 917.

⁹⁴ McGuire v. State, (Tex. App.) 15 S. W. Rep. 917.

⁹⁵ Walker v. State, 25 Tex. App. 448, 8 S. W. Rep. 644.

⁹⁶ Kobleneschlag v. State, 23 Tex. App. 264, 4 S. W. Rep. 888.

minor's appearance at the time, he would have taken him to be of a given age.⁹⁷

§ 417. Ignorance of Minority of Purchaser as a Defense.

Where the statute does not *expressly* make the knowledge of the purchaser's minority an essential element of the offense of selling liquor to him, the question fairly arises whether honest ignorance or mistake of fact is a good defense to an indictment for such offense. In several of the states (though not in all) the authorities have established a rule on this point which may be stated in the following terms: If a person sells liquor to one having the appearance of being of full age, he is not liable to criminal prosecution, if such sale was made in good faith, after the exercise of due caution and diligence, and in the reasonable and honest belief that the purchaser was an adult, although he was in fact a minor.⁹⁸ The doctrine upon which this rule rests is that there can be no criminal liability unless there is a criminal intent, and that if a person is honestly misled or mistaken as to facts, through no fault or carelessness of his own, and therefore

⁹⁷ *Garner v. State*, 28 Tex. App. 561, 13 S. W. Rep. 1004.

⁹⁸ *State v. Kalb*, 14 Ind. 403; *Farbach v. State*, 24 Ind. 77; *Rineman v. State*, Id. 80; *Brown v. State*, Id. 113; *Goetz v. State*, 41 Ind. 162; *Robinius v. State*, 63 Ind. 235, 67 Ind. 94; *Payne v. State*, 74 Ind. 203; *Hunter v. State*, 101 Ind. 241; *Kreamer v. State*, 106 Ind. 192, 6 N. E. Rep. 341; *Mulreed v. State*, 107 Ind. 62, 7 N. E. Rep. 884; *Behler v. State*, 112 Ind. 140, 13 N. E. Rep. 272; *Ross v. State*, 116 Ind. 495, 19 N. E. Rep. 451; *Adler v. State*, 55 Ala. 16; *Reich v. State*, 63 Ga. 616; *Miller v. State*, 3 Ohio St. 475; *Aultfather v. State*, 4 Ohio St. 467; *Faulks v. People*, 39 Mich. 200, 33 Am. Rep. 374, (but compare *People v. Roby*, 52 Mich. 577, 18 N. W. Rep. 365, 50 Am. Rep. 270;) *People v. Welch*, 71 Mich. 548, 39 N. W. Rep. 747. In *Bishop*, Stat. Crimes, § 1022, the learned author says: "The

result is, that one whom the law permits to sell intoxicating liquor, and whose purpose and endeavor it is to conform to the law in all things, and to do no wrong of any sort, is legally, the same as he is morally, justified in acting, like other people in respect of other things, on what upon careful investigation and inquiry appear to be the facts; so that if, believing the appearances, he does what would be legally and morally right were the real facts so, he is not punishable, though he was deceived, and they were different. Thus, if one authorized to sell liquor to adults and forbidden to sell it to minors, is, without his fault or carelessness, led to believe an applicant to be an adult while truly he is a minor, he is not punishable though he makes the sale—a proposition which some deny."

in good faith believes his act to be justified, he cannot be charged with a criminal intent, although, as the facts really are, his act is a violation of the statute. "It cannot be assumed," says the court in Michigan, "that the legislature would attempt such a wrong as to punish as criminal an act which involved no criminal intent. There can be no crime where there is no criminal mind. This principle is as old as the criminal law, and underlies the whole of it."⁹⁹ But it must be remembered, as an important part of this rule, that ignorance or mistake of fact is an affirmative defense; and the defendant must assume the burden of proving that he acted in a reasonable and honest, though mistaken, belief.¹⁰⁰ And he must show that he exercised special caution and diligence to discover whether the applicant was a minor or not,—such diligence, it is said, as will satisfy the jury that he was making an honest inquiry to ascertain the truth.¹⁰¹ He may show, if he knew the person but not his age, that he was treated by his parents, his friends, and the community in general, as an adult.¹⁰² The fact that the purchaser represented himself as an adult, or declared that he was, in answer to a question, or that he had the physical appearance of being of age, or wore a beard, is not enough for the seller to rely upon; without proof of some further investigation or means of knowledge, or of his having been otherwise misled, such facts will not warrant an acquittal.¹⁰³ But in Michigan, although the statute declares that any sale of liquor to a minor shall be *prima facie* evidence of an intent to violate the law, it is held that proof that the defendant, relying on the minor's statement that he was of full age, made the sale in good faith, will exempt him from liability.¹⁰⁴

§ 418. Mistake of Fact Held no Defense.

The main rule stated in the foregoing section is not universally accepted as correct. On the contrary, it is held, in many of the

⁹⁹ *Faulks v. People*, 39 Mich. 200, 33 Am. Rep. 374.

¹⁰⁰ *Farbach v. State*, 24 Ind. 77; *Rine-man v. State*, Id. 80.

¹⁰¹ *Reich v. State*, 63 Ga. 616.

¹⁰² *State v. Kalb*, 14 Ind. 403.

¹⁰³ *Swigart v. State*, 99 Ind. 111; *Behler v. State*, 112 Ind. 140, 13 N. E. Rep. 272; *Goetz v. State*, 41 Ind. 162.

¹⁰⁴ *People v. Welch*, 71 Mich. 548, 39 N. W. Rep. 747.

states, that the vendor of intoxicating liquors is bound to determine for himself, at his peril, whether or not the purchaser is a minor; and if he sells to one who is a minor, he is criminally liable, notwithstanding he was actually ignorant of the fact and honestly believed that the person was of full age.¹⁰⁵ The principle upon which this doctrine is sustained is that ignorance of fact is no defense where the statute makes the act indictable irrespective of guilty knowledge. "Where a statute commands that an act be done or omitted which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute will not excuse its violation."¹⁰⁶ There is nothing anomalous in this rule. In a great variety of cases of statutory offenses, more especially such as have to do with matters relating to police regulation, the laws impose criminal penalties, irrespective of any intent to violate them, the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible.¹⁰⁷ As remarked by the court in Illinois: "The law imposes upon the licensed seller the duty to see that the party to whom he sells is authorized to buy, and if he makes a sale without this knowledge, he does it at his peril. . . . It is no answer to this view to say that the licensee may sometimes be imposed upon and made to suffer the penalties of the law when he had no intention to violate its provisions. This is a risk incident to the business he has undertaken to conduct, and as he receives the gains connected therewith, he must assume also with it all the hazards."¹⁰⁸ In respect to the argument that if the accused did not

¹⁰⁵ State v. Kinkead, 57 Conn. 173, 17 Atl. Rep. 855; Comm. v. Uhrig, 138 Mass. 492; Comm. v. Barnes, Id. 511; *In re* Carlson, 127 Pa. St. 330, 18 Atl. Rep. 8; Redmond v. State, 36 Ark. 58, 38 Am. Rep. 24; Crampton v. State, 37 Ark. 108; Pounders v. State, Id. 399; State v. Cain, 9 W. Va. 559; State v. Gilmore, Id. 641; Ulrich v. Comm., 6 Bush, 400; McCutcheon v. People, 69 Ill. 601; Farmer v. People, 77 Ill. 322; Flynn v. Galesburg, 12 Ill. App. 200; Jamison v. Burton, 43 Iowa, 282; State v. Thomp-

son, 74 Iowa, 119, 37 N. W. Rep. 104; State v. Bruder, 35 Mo. App. 475; State v. Hartfiel, 24 Wis. 60; State v. Chastain, 19 Oreg. 176, 23 Pac. Rep. 963; 1 Wharton, Crim. Law, § 88; 3 Greenl. Ev. § 21.

¹⁰⁶ State v. Hartfiel, 24 Wis. 61.

¹⁰⁷ The reader will find numerous instances of such statutes referred to, with citation of authorities, in the case of People v. Roby, 52 Mich. 577, 18 N. W. Rep. 365, 50 Am. Rep. 270.

¹⁰⁸ McCutcheon v. People, 69 Ill. 601.

know the person was a minor, he could not have intended a crime, the supreme court of Connecticut observes: "This argument is specious, but it is hardly sound. We have no occasion to impute to the legislature an intention to make an act a crime irrespective of the intent; for it is competent for the legislature to supply the intent by making circumstances equivalent thereto. It has virtually said that if a licensed person allows one who may or may not be a minor to loiter on his premises, without using means to ascertain the fact, he shall be guilty of the offense, if the person proves to be a minor."¹⁰⁹ But in Arkansas, it is said that the fact that defendant honestly believed that a minor to whom he sold liquor was of full age, will mitigate the punishment, though it will not justify or excuse him.¹¹⁰

§ 419. Consent of Parent or Guardian.

If the statute simply prohibits the sale of liquor to any minor, without more, the criminality of such a sale is not condoned or waived by the acquiescence or authorization of those having the legal control over the minor. In such a case, it is no defense to an indictment that the minor's father or guardian authorized the sale of liquor to him,¹¹¹ or that the father was in the habit of sending his son to defendant's place after liquor,¹¹² or that the father had consented that the minor should drink lager beer.¹¹³ But in some of the states, the law makes the sale of liquor to a minor a misdemeanor only when it was made "without the written consent of the parent or guardian" of such minor. Under such a provision, the party cannot justify the act of selling to the minor by establishing that he did it by order of the parent, unless he shows that the order was in writing.¹¹⁴ The oral consent of the father is not sufficient, though the father was present when the sale was made, or though the oral consent was afterwards reduced to writing.¹¹⁵ The theory of these decisions is that,

¹⁰⁹ State v. Kinkead, 57 Conn. 173, 17 Atl. Rep. 855.

¹¹⁰ Crampton v. State, 37 Ark. 108; Pounders v. State, Id. 399.

¹¹¹ State v. Lawrence, 97 N. Car. 492,

2 S. E. Rep. 367; State v. Clottu, 33 Ind. 409.

¹¹² Boatright v. State, 77 Ga. 717.

¹¹³ Adler v. State, 55 Ala. 16.

¹¹⁴ State v. Coenan, 48 Iowa, 567.

¹¹⁵ State v. Bruder, 35 Mo. App. 475;

the offense being against the state, "the father has no power to condone it, and cannot deprive the sale of its criminal character except by following the statute; that is, by giving his consent in writing prior to the sale. The legislative intent in requiring this prerequisite was doubtless to insure deliberation on the part of the parent, uninfluenced by the desire to shield or fear to punish the guilty seller, as well as to secure such evidence of the fact of consent as to end dispute upon that subject."¹¹⁶ A statute so framed is violated by the delivery of liquor to a minor, asking for it in behalf of one to whom it might lawfully have been sold.¹¹⁷ Whether the written authority may be general, and intended to cover all future sales until withdrawn, or whether it must be specific for each occasion, is a question as yet unsettled. In Arkansas, it is held that a writing expressed as follows: "Please let my son John have anything in reason, or a drink when he wants it," signed and delivered to the seller by the father, is a continuing authority to sell to the minor, and, until revoked, a complete defense to an indictment for selling liquor to such minor in ordinary retail quantities.¹¹⁸ But in Georgia, it is held that the written authority from the parent or guardian must be special for each occasion. A general permit or license for the minor to drink liquor in a specified bar-room, without limitation as to time or quantity, is void.¹¹⁹ It is no defense to a prosecution for the sale of liquor to a minor, without first obtaining written authority from his parent or guardian, that the parents were both dead and he had no guardian.¹²⁰

Blahut v. State, (Ark.) 16 S. W. Rep. 582; *Hill v. State*, 37 Ark. 395.

¹¹⁶ *Blahut v. State*, (Ark.) 16 S. W. Rep. 582.

¹¹⁷ *State v. Fairfield*, 37 Me. 517. But where a liquor-dealer sells whisky to a boy, on his representation that it is needed for his sick mother's immediate use, and that his father had sent him for it in a hurry without giving him a written order, it is held that this,

though within the letter, is not within the spirit, of the statute, and hence a conviction on such a state of facts must be set aside. *Waldstien v. State*, (Tex. App.) 14 S. W. Rep. 394.

¹¹⁸ *Mascowitz v. State*, 49 Ark. 170, 4 S. W. Rep. 656.

¹¹⁹ *Gill v. State*, (Ga.) 13 S. E. Rep. 86.

¹²⁰ *Blair v. State*, 81 Ga. 628, 7 S. E. Rep. 855.

§ 420. Sale to Minor as Agent or Messenger for an Adult.

When a minor purchases liquor, not for his own consumption, but for the use of another person, as whose agent or messenger he is acting, and to whom the sale might lawfully be made, the guilt or innocence of the seller will depend upon the disclosure to the seller of the fact of agency, because, so far as concerns the seller, that will determine the person who is to fill the character of purchaser. If the minor informs the liquor-dealer that the liquor purchased is for the use of another person, who has sent him to buy it, and with whose money he pays for it, such being in truth the case; or if the dealer knows, from other sources of information, that the real purchaser is an adult and the minor is only his messenger; then the sale takes place between the dealer and the adult, the minor is not concerned in it except as the conduit by which the money is conveyed to the one and the liquor to the other, and consequently the dealer cannot be convicted of selling to the minor.¹²¹ "To 'sell' liquor to a minor is what is forbidden by the statute. Merely to deliver liquor to a minor, with notice that it is to be carried to an adult, is not a sale, within the meaning of the statute. We cannot extend the terms of a criminal statute beyond its clear legal meaning. We cannot construe the word 'sell' in the statute to mean something different from its ordinary legal import. Undoubtedly, a minor may be an agent or lawfully go on errands for an adult, and a person may buy through an agent, and in such case, there being no question of the fact of agency, although the dealing is with the agent, and the delivery is to him, in legal effect, the sale is to the principal. The law is, that where a person contracts as agent, or he is known to be such, the

¹²¹ Comm. v. Lattinville, 120 Mass. 385; O'Connell v. O'Leary, 145 Mass. 311, 14 N. E. Rep. 143; State v. McMahon, 53 Conn. 407, 5 Atl. Rep. 593, 55 Am. Rep. 140; State v. Walker, 103 N. Car. 413, 9 S. E. Rep. 582; Monaghan v. State, 66 Miss. 513, 6 South. Rep. 241; Wallace v. State, (Ark.) 16 S. W. Rep.

571; Randall v. State, 14 Ohio St. 435. But in a prosecution for the sale of liquor to a boy eleven years old, the boy's statement that the liquor was for his sick mother, and defendant's belief therein, constitute no defense. Holmes v. State, 88 Ind. 145.

contract is with the principal, and not with the agent; but where the agent deals in his own name, and the principal is not disclosed or known, the contract is with the agent, and he is liable."¹²² Hence, for example, the seller should be allowed to show that the liquor was drawn and delivered to the minor in pursuance of an agreement between his parent and the defendant, on the previous day, for its purchase and subsequent delivery to the minor.¹²³

But on the other hand, as between a seller and an agent, who deals with him without disclosing the fact that he acts as agent, the latter, as well as the principal, may be regarded as the purchaser. A liquor-seller who contracts with a minor may therefore be convicted of selling liquor to a minor, notwithstanding the fact may subsequently be disclosed that the minor acted as agent for an adult. In other words, if the seller has no notice or knowledge, either from the statements of the minor, from a previous course of dealing, or from other sources, that the minor is making the purchase for any one but himself, so that, for all the seller knows to the contrary, he is selling liquor to a minor for the latter's own use, he is guilty of the statutory offense, although, in point of fact, the minor was acting as agent or messenger for another.¹²⁴

In some of the states, the statutes are so framed as to render unlawful the delivery of liquor to a minor, even when he acts merely in the behalf of a disclosed principal. Thus, in Massachusetts, under a law which provides that "no sale or delivery of liquor shall be made on the premises described in the license . . . to a minor, either for his own use, the use of his parent, or of any other person," it is held that a complaint, alleging a sale to a minor, may be sustained by evidence of a sale to a minor for the use of an adult, although the fact of its being for such adult's use was disclosed at the time of the sale, and the minor was merely a messenger sent for the liquor.¹²⁵

If the person for whose use the liquor was procured was a person

¹²² *Monaghan v. State*, 66 Miss. 513, 6 South. Rep. 241.

¹²³ *Randall v. State*, 14 Ohio St. 435.

¹²⁴ *Siceluff v. State*, 52 Ark. 56, 11 S. W. Rep. 964; *Comm. v. Fowler*, 145 Mass. 398, 14 N. E. Rep. 457; *Ross v.*

People, 17 Hun, 591; *Ritcher v. State*, 63 Miss. 304.

¹²⁵ *Comm. v. O'Leary*, 143 Mass. 95, 8 N. E. Rep. 887. See, also, *People v. Garrett*, 68 Mich. 487, 36 N. W. Rep. 234.

not authorized to buy,—as where one minor sends another to get liquor for him,—it is evident that the seller has committed an offense, however the transaction may be regarded. But whether the sale must be considered as made to one or other of the minors, must be determined in accordance with the rules already stated, and this will make an important difference in the indictment. But because a sale of liquor, made or attempted to be made to a parent through the agency of a minor child, is illegal because the seller was not licensed, it does not therefore become a sale to the minor.¹²⁶

§ 421. Adult "Treating" Minor.

Where a minor and an adult go together to a liquor-saloon, and the adult calls for liquor, and it is furnished to both, and both drink, and the adult pays for the whole, the sale is to the adult, and the dealer cannot be indicted for selling to a minor.¹²⁷ Neither, in such a case, according to some of the authorities, can the seller be charged with "giving away" liquor to the minor.¹²⁸ But this last proposition is not undisputed. In some jurisdictions, it is thought that one who furnishes liquor to a minor, at the instance of a third person who pays for the liquor and gives it to the minor, is guilty of the statutory offense of "giving" liquor to a minor.¹²⁹ It is true, say these authorities, that the third person was primarily the donor, but the liquor-seller acted in concert with him and participated in the transaction, by furnishing the liquor at the third person's direction, and "all persons who participate in an act or transaction which is a misdemeanor are alike guilty." But however the case may be in regard to a sale or gift, if the statute prohibits the *furnishing* of liquor to minors, it is clear that a saloon-keeper who, without protest, allows an adult to buy intoxicating liquor and give it to a minor to drink in his saloon, is guilty of a violation of the statute.¹³⁰ Ac-

¹²⁶ O'Connell v. O'Leary, 145 Mass. 311, 14 N. E. Rep. 143.

¹²⁷ Ward v. State, 45 Ark. 351; Siegel v. People, 106 Ill. 89.

¹²⁸ Kurz v. State, 79 Ind. 488.

¹²⁹ Topper v. State, 118 Ind. 110, 20 N.

E. Rep. 699; Page v. State, 84 Ala. 446, 4 South. Rep. 697.

¹³⁰ People v. Neumann, (Mich.) 48 N. W. Rep. 290; State v. Best, (N. Car.) 12 S. E. Rep. 907; State v. Munson, 25 Ohio St. 381. In the case last cited it was

ording to the supreme court of Michigan, "A narrow and technical definition of the word 'giving' might restrict its meaning to the handing of the liquor to him direct by the person giving it, as seems to be held by the supreme court of Illinois; but it is not necessary that a person should hand the liquor to a minor in order to furnish it. If the liquor, belonging to the person, and under his control, is, by his consent or connivance, permitted to be taken and drank by the minor, whether it is passed to him direct or through the hands of another, is immaterial; the liquor in either case is furnished to such minor, within the meaning of our statute."¹³¹ It is further to be observed that, irrespective of the liability of the seller, in a case such as we have supposed, there may be a criminal responsibility on the part of the person who "treats" the minor, if the statute prohibits either the "giving" or "furnishing" to persons under age. Such a law does not apply to liquor-dealers alone, but also to one who buys liquor and furnishes it to the minor.¹³²

§ 422. Purchase by Adult as Agent of Minor.

If a minor procures an adult to go to a saloon and purchase liquor for him, with his money which he gives him for that purpose, and the minor is not present at the purchase, and the adult does not disclose his agency, and the seller does not know, and has no reason to sus-

said: "The rule at common law is that, in offenses less than felony, all who aid, advise, or procure the commission of an offense, though absent at the time of its commission, are principals; but in all classes of offenses, those who are present at their commission, giving aid and assistance, are alike principals. This principle is applicable here. The gist of the offense consisted in furnishing the liquor to Johnston, [the minor,] to be drunk by him, knowing him to be a minor. The defendant was the only one present who had liquor to furnish, and he supplied it with the understanding that one glass of it was to be drunk by Johnston. The liquor passed directly from the defendant to Johnston.

True, it was supplied by defendant at the instance of McCoy, who was to pay for it; but the unlawfulness of the act is not affected by that fact. Whether it was to be paid for or not, was, under the statute, immaterial. If the liquor was supplied by the defendant to Johnston, to be drunk by him, knowing him to be a minor, the offense was complete; and it would be no defense that the defendant acted at the instance or under the employment of another."

¹³¹ *People v. Neumann*, (Mich.) 48 N. W. Rep. 290.

¹³² *Comm. v. Davis*, 12 Bush, 240; *Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 522.

pect, that the adult is acting as agent for a minor, he cannot be convicted of making a sale to the minor.¹³³ But if the seller knows the facts, he is guilty. For in that case, the minor stands disclosed as the principal in the transaction, and the sale is regarded, on familiar principles, as made to him, though through the intervention of an agent. Thus, where, at the suggestion of the seller, a by-stander is induced by a minor to purchase liquor for him, and with his money, the effect is the same as if the sale had been made directly to the minor.¹³⁴ But the person, who at a minor's request and with his money, purchases liquor and delivers it to him, is not guilty of selling liquor to a minor.¹³⁵

§ 423. Sale of Liquor to Intoxicated Person.

Where the statute, as is commonly the case, provides that it shall be unlawful for "any person" to sell or furnish liquor to a man in a state of intoxication, the prohibition is not understood as confined to licensed dealers, but the statutory offense may be committed by any person.¹³⁶ If a third person pays for the liquor which the intoxicated person drinks, it is true there is no sale as between the dealer and the drunken man, but the seller may still be guilty of the offense of "disposing of" liquor to the intoxicated person, under a statute using that expression.¹³⁷ And where liquor is bought for the use of a drunken man by an agent authorized by him, the fact of the agency being known to the seller, the sale may be considered as made directly to the principal.¹³⁸ It is held that the word "intoxicated," as used in these statutes, is to be taken in its common and ordinary signification, and it means intoxicated by the use of alcoholic liquors.¹³⁹ And it is ruled that a person is drunk, in a legal sense, when he is so far under the

¹³³ Gillan v. State, 47 Ark. 555, 2 S. W. Rep. 185. Compare State v. Scoggins, 107 N. Car. 859, 12 S. E. Rep. 59.

¹³⁴ Liles v. State, 88 Ala. 139, 7 South. Rep. 196.

¹³⁵ Cox v. State, (Miss.) 3 South. Rep. 373; Johnson v. State, 68 Miss. 280; Young v. State, 58 Ala. 358; Bryant v. State, 82 Ala. 51, 2 South. Rep. 670.

¹³⁶ Altenburg v. Comm., 126 Pa. St. 602, 17 Atl. Rep. 799.

¹³⁷ State v. Hubbard, 60 Iowa, 466, 15 N. W. Rep. 287.

¹³⁸ Schulher v. State, (Miss.) 8 South. Rep. 328.

¹³⁹ State v. Kelley, 47 Vt. 294.

influence of intoxicating liquor that his passions are visibly excited or his judgment impaired.¹⁴⁰ Or "whenever a man is under the influence of liquor so as not to be entirely at himself, he is intoxicated, though he can walk straight, though he can attend to his business, and may not give any outward and visible signs to the casual observer that he is drunk."¹⁴¹ Inasmuch, however, as the symptoms of intoxication are most commonly of an obvious or easily discoverable sort, and by no means unfamiliar to ordinary observers, the seller of liquors can seldom be at a loss to determine the condition of a purchaser. And if his knowledge of the inebriety of the purchaser were an essential element of the offense, it might be established by proof of the same facts which enable the witnesses to speak as to the drunken condition of the latter. But the authorities hold that the question of the seller's knowledge is not material. It is no defense to say that he did not know that the purchaser was intoxicated. If that was the case, it does not relieve him from liability.¹⁴²

§ 424. Sales to Habitual Drunkards.

The statutes regulating the sale of liquor commonly provide that it shall be a punishable offense to sell liquor to an "habitual drunkard" or to a "person of known intemperate habits." A provision of this character is not confined to licensed retailers, but may be violated as well by an unlicensed dealer.¹⁴³ The only difference is that, in the latter case, the seller would commit two offenses in the same act. And a bar-keeper who sells liquor to a third person, with knowledge that a person of intemperate habits is to join in the drinking of it, and permits such intemperate person to drink the liquor in his presence, is guilty of the statutory offense.¹⁴⁴ But a person who merely acts as the agent of the drunkard, in going to the saloon and procuring liquor for him with his money, does not commit the offense.¹⁴⁵ No other intent is necessary to support a con-

¹⁴⁰ *State v. Pierce*, 65 Iowa, 85, 21 N. W. Rep. 195. See, also, *Comm. v. Trimble*, 150 Mass. 89, 22 N. E. Rep. 439.

¹⁴¹ *Elkin v. Buschner*, (Pa. Sup.) 16 Atl. Rep. 102.

¹⁴² *Church v. Higham*, 44 Iowa, 482;

Comm. v. Julius, 143 Mass. 132, 8 N. E. Rep. 898; *Whitton v. State*, 37 Miss. 379.

¹⁴³ *Fitzenrider v. State*, 30 Ind. 238.

¹⁴⁴ *Walton v. State*, 62 Ala. 197.

¹⁴⁵ *Young v. State*, 58 Ala. 358.

viction than that which the act of voluntarily delivering the liquor to a person of known intemperate habits of itself imports. When this act is voluntarily done, the law is broken.¹⁴⁶ Nor is it necessary to complete the offense, that the person should be intoxicated at the time the liquor is furnished.¹⁴⁷ And it is unlawful for a saloon-keeper to sell spirituous liquors to a person whom he knows to be in the habit of getting intoxicated, even though the statement is made by the purchaser that a physician has ordered such liquor for sickness in his family.¹⁴⁸ In some of the states it is made an offense to sell liquor to an habitual drunkard only after notice of the person's habits, in writing, has been given to the liquor-dealer. Where the statute is so framed as to require such notice to be given by a "citizen of the township," it is held that an averment that the notice was given by the *wife* of a citizen of the township is not sufficient, unless it is also averred that she was a citizen of the township.¹⁴⁹

§ 425. What Constitutes Intemperate Habits.

A drunkard, it is said, is one whose habit is to get drunk,—one whose ebriety has become habitual. The terms "drunkard," "common drunkard," and "habitual drunkard" all mean the same thing.¹⁵⁰ An habitual drunkard is one who is in the habit of becoming intoxicated, or one who commonly or frequently is drunk; not that he is constantly or universally drunk.¹⁵¹ While "intemperate habits," within the meaning of the statute, cannot be predicated of a person who occasionally drinks to excess, neither is it necessary to show that he is drunk every day. If sobriety is the rule, and occasional intoxication the exception, he is not within the statute. And on the other hand, if the habit is to drink to intoxication when occasion offers, and sobriety or abstinence is the exception,—as when one is accustomed to remain sober while at home, but generally drinks to

¹⁴⁶ Hill v. State, 62 Ala. 168.

¹⁴⁷ Fountain v. Draper, 49 Ind. 441.

¹⁴⁸ McDonald v. Casey, (Mich.) 47 N. W. Rep. 1104.

¹⁴⁹ Engle v. State, 97 Ind. 122.

¹⁵⁰ Comm. v. Whitney, 5 Gray, 86.

¹⁵¹ State v. Pratt, 34 Vt. 323; Comm. v. McNamee, 112 Mass. 286; Ludwick v. Comm., 18 Pa. St. 172; Ins. Co. v. Foley, 105 U. S. 350; Northwestern L. Ins. Co. v. Muskegon Bank, 122 U. S. 501, 7 Sup. Ct. Rep. 1221.

excess when in company, or when visiting the town or village,—the charge of intemperate habits is sustained.¹⁵² As a general rule, the question whether or not a man is an habitual drunkard, or a person of intemperate habits, is a question of fact for the jury to determine from the evidence in each particular case.¹⁵³ Perhaps, in a very clear case, the court might be warranted in ruling positively that the person was or was not within the statute. But the court is not justified in setting up any fixed and invariable standard to govern the determination of the jury. For example, it is error to instruct the jury that “when a person gets intoxicated from three to five times in two years, then in law he is a person who is in the habit of getting intoxicated.”¹⁵⁴ So when a witness testifies that the person in question used liquors to excess at some particular time, and that he has seen him the worse for liquor a number of times, and another witness says that the person is a “dissipated man,” this evidence has a legal tendency to show that the person is an habitual drunkard in the sense in which that term is used in the statute, but its sufficiency in amount is wholly a question for the jury.¹⁵⁵ Further, it is held that this question of the person’s habits of drunkenness is one of fact, directly provable, and not an opinion or conclusion from other facts.¹⁵⁶ Where the criminality of the sale depends upon the previous giving of notice to the liquor-dealer, there is no error in charging the jury that, in order to convict the defendant, it is necessary that it should be proved that the person was in the habit of being intoxicated both at the time the notice was served and at the time when the liquor was furnished to him.¹⁵⁷

¹⁵² *Tatum v. State*, 63 Ala. 147.

¹⁵³ *Kamman v. People*, 24 Ill. App. 388; affirmed, 124 Ill. 481, 16 N. E. Rep. 661; *Murphy v. People*, 90 Ill. 59; *Harrison v. Ely*, 120 Ill. 83, 11 N. E. Rep. 334.

¹⁵⁴ *Kamman v. People*, 24 Ill. App.

388; affirmed, 124 Ill. 481, 16 N. E. Rep. 661.

¹⁵⁵ *State v. Pratt*, 34 Vt. 323.

¹⁵⁶ *Gallagher v. People*, 29 Ill. App. 397, 401; affirmed, 120 Ill. 179, 11 N. E. Rep. 335.

¹⁵⁷ *State v. Dolan*, 122 Ind. 141, 23 N. E. Rep. 761.

§ 426. Seller's Knowledge of Purchaser's Habits.

Under the statutes prohibiting the sale of liquor to habitual drunkards, it is held, in many of the states, that it is not necessary, to constitute the offense, that the seller should have knowledge of the buyer's habits of intemperance, and that ignorance or mistake of fact in that regard is no defense to an indictment.¹⁵⁸ "The law is well settled in this state and elsewhere that, where a statute commands an act to be done or omitted which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute will not excuse its violation."¹⁵⁹ In Pennsylvania, where the statute prohibits the sale of liquor to a person of "known intemperate habits," the supreme court holds that the habits must be known to the community, but not necessarily to the seller; that is, although the seller may have no personal knowledge that his customer is a drunkard, the statutory offense is committed if he sells liquor to one who in fact is intemperate in his habits and who bears that reputation in the neighborhood in which he lives.¹⁶⁰

¹⁵⁸ *Barnes v. State*, 19 Conn. 398; *Walton v. State*, 62 Ala. 197; *State v. Farr*, (W. Va.) 11 S. E. Rep. 737; *Mapes v. People*, 69 Ill. 523; *Dudley v. Sautbaine*, 49 Iowa, 650; *State v. Ward*, 75 Iowa, 637, 36 N. W. Rep. 765; *State v. Heck*, 23 Minn. 549. In this connection, what we have already said of ignorance or mistake of fact as a defense to prosecutions for selling liquor to minors will be found applicable. *Supra*, §§ 416-418.

¹⁵⁹ *State v. Farr*, (W. Va.) 11 S. E. Rep. 737, citing *State v. Cain*, 9 W. Va. 559; *State v. Denoon*, 31 W. Va. 122, 5 S. E. Rep. 315; *Barnes v. State*, 19 Conn. 398; 3 Greenl. Ev. § 21.

¹⁶⁰ *Comm. v. Zelt*, 138 Pa. St. 615, 21 Atl. Rep. 7. In this case it was said by Paxson, C. J.: "If the sale be contrary to law, the intent is immaterial. We are of opinion that selling liquor to persons of known intemperate habits

comes within the same rule as selling to minors, *i. e.*, the intent is not material. The words in the statute, 'persons of known intemperate habits,' are descriptive of a class to whom the dealer sells at his peril. It was urged, however, that such a rule would work injustice; that in many instances a man's intemperate habits are known to but few persons, perhaps only to members of his own family, or a night-watchman, who may have witnessed his convivial wanderings towards his home. The answer to this is that a man who conceals his habits does not come within the class. It is only when his intemperance has become so conspicuous as to form a habit, and that habit is known, not merely to his family, or to a night-watchman, but to his friends and neighbors and the community in which he lives, that the law forbids and punishes

But these propositions do not pass undisputed. In some jurisdictions the rule obtains that if the defendant had no knowledge, at the time of the sale, that the purchaser was a man of intemperate habits, and if the latter was a stranger to the defendant, was sober at the time, and had not the appearance of a person addicted to intoxication, the defendant is entitled to an acquittal.¹⁶¹ But if the defense of ignorance or mistake is available at all, it is an affirmative defense, which must be set up by the accused.¹⁶² On a similar principle, it is held, in Ohio, that if the liquor was obtained by false pretences and imposition on the seller, so that he had no intent to violate the law, he cannot be convicted.¹⁶³

As to the means of proving the seller's knowledge of the habits of the purchaser, it is held that, when evidence has been given tending to prove that the purchaser was in the habit of becoming intoxicated, and that he resided in the neighborhood of the vendor, it is competent to give his general reputation in that behalf in evidence, as a circumstance tending to prove the vendor's knowledge of such habit.¹⁶⁴ And the defendant may show that, before the alleged sale, he inquired of several of the purchaser's acquaintances whether he was in the habit of becoming intoxicated, and what information he obtained; but his good faith and due care in seeking and obtaining

the sale of liquor to him. Every man has a reputation for sobriety, or for intemperance, in the community in which he resides, just as every man has a reputation for integrity or for truth, and such reputation is generally known. None know better than saloon-keepers themselves the habits and reputation of their neighbors, as to drinking, and when a man is known as an 'intemperate man' in his neighborhood, not known to every one, but known generally, to be such, the person who sells him liquor must take notice of that fact at his peril. Any other consideration of the act would destroy it for all practical purposes. It might as well be repealed."

But if the buyer, although known in

his own community as an intemperate man, made the particular purchase in a locality where he was not known,—say, in another county,—it would seem, in such a case, that the seller should be acquitted, unless he had actual knowledge at least of the *reputation* of the purchaser. See, as bearing on this point, *Elkin v. Buschner*, (Pa. Sup.) 16 Atl. Rep. 102.

¹⁶¹ *Deveny v. State*, 47 Ind. 208; *Williams v. State*, 48 Ind. 306; *Comm. v. McNeff*, 145 Mass. 406, 14 N. E. Rep. 616.

¹⁶² *Allison v. State*, 47 Ind. 140.

¹⁶³ *Miller v. State*, 5 Ohio St. 275.

¹⁶⁴ *Adams v. State*, 25 Ohio St. 584. And see *State v. Wooley*, 59 Vt. 357, 10 Atl. Rep. 84.

such information, as well as the proper effect thereof under all the circumstances, must be left to the jury.¹⁶⁵

§ 427. Sale of Liquor to Indians.

By the laws of the United States it is provided that every person, except an Indian in the Indian country, who shall sell spirituous liquor to any Indian under the charge of any Indian superintendent or agent, shall be punishable by imprisonment for not more than two years and by a fine not exceeding three hundred dollars.¹⁶⁶ This legislation is constitutional, being based upon the power of congress to regulate commerce with the Indian tribes. And this power extends to the regulation of commerce with such tribes and with the individual members thereof, although the traffic, and the Indian with whom it is carried on, are wholly within the territorial limits of a state.¹⁶⁷ And although the particular Indian may have abandoned his nomadic life and tribal relations, and adopted the habits and manners of civilized people, yet, if he remains under the charge of an Indian agent, the disposition to him of spirituous liquors is a violation of the statute.¹⁶⁸ And it is not necessary, to complete the offense, that the sale should have been made within the Indian country, if the other elements are present.¹⁶⁹ The offense created by this statute is not a felony, but a misdemeanor.¹⁷⁰ In addition to the act of congress referred to, there are statutes enacted in some of the states, prescribing and punishing the offense of selling liquor to an Indian or half-breed. Such a state law, it is held, does not conflict with the legislation of congress on the same subject, nor does it amount to an interference with the power of congress to regulate commerce with the Indian tribes. It is merely an exercise of the police power, and

¹⁶⁵ *Crabtree v. State*, 30 Ohio St. 382. Testimony as to whether a person is in the habit of getting intoxicated is admissible where the witnesses speak from personal observation. *Gallagher v. People*, 120 Ill. 179, 11 N. E. Rep. 335.

¹⁶⁶ Rev. St. U. S. § 2139.

¹⁶⁷ *United States v. Holliday*, 3 Wall. 407.

¹⁶⁸ *United States v. Osborn*, 2 Fed. Rep. 58.

¹⁶⁹ *United States v. Burdick*, 1 Dak. 142, 46 N. W. Rep. 571.

¹⁷⁰ *Brugier v. United States*, 1 Dak. 5, 46 N. W. Rep. 502.

is constitutional.¹⁷¹ The result is that, in those jurisdictions, one who sells liquor to an Indian may be punished for the same act both under the law of the state and under the law of the United States.¹⁷²

§ 428. Sale of Liquor on Sunday.

When the statute prohibits the sale of intoxicating liquors on Sunday, a person who is prosecuted for a violation of this provision cannot excuse himself from liability by showing that he is duly licensed for the sale of such liquor. His license gives him no authority to violate the law; it only confers a privilege which must be exercised in conformity to the law.¹⁷³ And a conviction is proper under an indictment for selling liquor without a license, although the proof shows that the sale was made on Sunday. The fact that the law makes special provision for the punishment of a sale on Sunday whether the accused has a license or not, does not alter the general provisions of the law prohibiting sales without license so as to render it inapplicable to sales made on Sunday.¹⁷⁴ And where the grant of power, in a municipal charter, to regulate the traffic in liquor, is expressly made subject to a condition that the power granted shall only be exercised subject to the general law of the state regulating the manner of conducting the business by the licensee, a statute prohibiting the sale of liquor on Sunday is operative in the municipality, and a municipal license is no defense to a prosecution under the statute.¹⁷⁵ Where the law makes it an offense for "any tavern-keeper or other person" to sell liquor on that day, it is held that the words "other person" mean a person engaged in the business of selling liquor.¹⁷⁶ And in Missouri, it is required to be shown that the sale was made

¹⁷¹ *Territory v. Guyot*, 9 Mont. 46, 22 Pac. Rep. 134.

¹⁷² *Territory v. Coleman*, 1 Oreg. 191.

¹⁷³ *State v. Ambs*, 20 Mo. 214. See *Thomasson v. State*, 15 Ind. 449; *Hingle v. State*, 24 Ind. 35; *State v. Drischel*, 26 Ind. 154, 180; *Parker v. State*, 27 Ind. 393; *Morris v. State*, 47 Ind. 503; *Comm. v. Gedikoh*, 101 Pa. St. 354; *Sifred v. Comm.*, 104 Pa. St. 179. In Missouri, the giving away of intoxicat-

ing liquor on Sunday by a dramshop-keeper is not an indictable offense. The penalty is a forfeiture of the license. *State v. Burnett*, 77 Mo. 570.

¹⁷⁴ *People v. Krank*, 110 N. Y. 488, 18 N. E. Rep. 242.

¹⁷⁵ *Heinssen v. State*, 14 Colo. 228, 23 Pac. Rep. 995.

¹⁷⁶ *Jensen v. State*, 60 Wis. 577, 19 N. W. Rep. 374.

for the accommodation of a customer, and was a continuation of the usual occupation of the week.¹⁷⁷ But in another state, under a statute providing that "no house-keeper shall sell any strong liquor on Sunday," it is held that a tavern-keeper is a house-keeper in the contemplation of the act.¹⁷⁸ When the law prohibits Sunday sales by "any druggist or druggist's clerk," except on the written prescription of a physician, a druggist who sells liquor on Sunday without a written prescription is liable to prosecution, although he is himself a physician.¹⁷⁹ And when such prescription is required to justify the sale, a licensed dealer is indictable for making a Sunday sale without it, although the liquor was bought for and used by a sick person, and the vendor was so informed at the time of the sale.¹⁸⁰ Nor is it a defense to a prosecution under these statutes that the defendant was a Jew, and conscientiously believed that the seventh day of the week should be observed as the Sabbath.¹⁸¹ In general it is not a necessary part of the offense of selling liquor on Sunday that the quantity sold should be within the statutory limit for retailing. The laws are usually so framed as to render the quantity sold immaterial.¹⁸² As to the kinds of liquor forbidden to be sold on that day, or whether any particular variety is excepted from the prohibition, information must be sought in the local statute. In Minnesota, for example, beer is not one of the articles permitted to be publicly sold on Sunday,¹⁸³ though this may not be the case in all of the states.

§ 429. Sunday Sales to Lodgers or Guests.

Whether the furnishing of liquor by an inn-keeper to a lodger or guest in his house, on Sunday, as part of the accommodation afforded by the house, would be an indictable offense if not expressly excepted from the statute prohibiting liquor-selling on that day, is a question not entirely free from doubt. In New York, it is held that the statute does not prevent hotel-keepers and inn-keepers from selling liq-

¹⁷⁷ *State v. Crabtree*, 27 Mo. 232.

¹⁷⁸ *State v. Fearson*, 2 Md. 310.

¹⁷⁹ *Tilford v. State*, 109 Ind. 359, 10 N. E. Rep. 107.

¹⁸⁰ *State v. Wool*, 86 N. Car. 703.

¹⁸¹ *Comm. v. Hyneman*, 101 Mass. 30.

¹⁸² *Schlicht v. State*, 31 Ind. 246.

¹⁸³ *State v. Baden*, 37 Minn. 212, 34 N. W. Rep. 24.

uor to their guests, on Sunday, to be taken with their meals.¹⁸⁴ But a contrary doctrine appears to obtain in Pennsylvania.¹⁸⁵ In Massachusetts, the statute allows an inn-keeper to furnish liquor on Sunday to "guests who have resorted to his house for food or lodging." And hereunder it is held that the burden is on the defendant to show that persons to whom he sold liquor on Sunday were such guests of his inn.¹⁸⁶ Persons who resort to an inn on Sunday for the purpose of procuring and drinking liquor are not guests, within the meaning of the statute.¹⁸⁷ And the fact that an inn-keeper requires persons who apply to him for liquor on Sunday to eat a cold lunch before they can be served, does not make such persons guests.¹⁸⁸

§ 430. Sale of Liquor on Election-Days.

For obvious reasons of public importance, the laws of the several states commonly require that saloons shall be kept closed on election-days. From the great variety of elections which take place under our systems, however, it is sometimes difficult to determine whether the day of holding a given election comes within the purview of the statute. In this connection, if the language of the act is general, prohibiting the sale of liquor on the day of "any election," it is held to be proper to consider the terms used in other sections of the same statute; as, one prohibiting druggists from selling liquor on the "day of any state, county, township, primary, or municipal election."¹⁸⁹ An election by a city, under a statute authorizing cities to construct water-works, is held to be a "municipal election," within the meaning of such a statute.¹⁹⁰ But in Arkansas, it is considered that the day of the election of a school director is not within the purview of the act.¹⁹¹ On the day of a special election, in a certain ward, a sale of liquor in the city, though outside of such ward, is in violation of a law prohibiting sales "upon the day of any election in the township, town, or city

¹⁸⁴ *In re Breslin*, 45 Hun, 210.

¹⁸⁵ *Omit v. Comm.*, 21 Pa. St. 426.

¹⁸⁶ *Comm. v. Molter*, 142 Mass. 538, 8 N. E. Rep. 428.

¹⁸⁷ *Comm. v. Moore*, 145 Mass. 244, 13 N. E. Rep. 893.

¹⁸⁸ *Comm. v. Hagan*, 140 Mass. 289, 3 N. E. Rep. 207.

¹⁸⁹ *State v. Hirsch*, 125 Ind. 207, 24 N. E. Rep. 1062.

¹⁹⁰ *State v. Kidd*, 74 Ind. 554.

¹⁹¹ *Stout v. State*, 43 Ark. 413.

where the same may be holden.”¹⁹² In Indiana, the supreme court has determined that the statute, prohibiting the sale of liquor “on the day of any election,” includes the day of a *primary* election held by a political party to select candidates. This decision is supported by the following reasoning: “The words ‘primary election’ are as well understood to mean the act of choosing candidates by the respective political parties to fill the various offices as the word ‘election’ is to mean the final choice of all the electors of the persons to fill such offices; so that the words ‘any election’ clearly include primary elections, and such elections come within the letter of the statute. The object and purpose of the statute was to prevent elections from being influenced by the use of intoxicating liquors, and to put it beyond the power of any person to secure an election to office by the use or influence of intoxicating liquors; and, as it is the first step to an election to an office by all the electors to be chosen as a candidate of some political party at the primary election held by such party, it is manifestly as important to prohibit the sale of intoxicating liquor on the day of a primary election as upon the day of the final election by all the electors; therefore primary elections manifestly come within the spirit as well as the letter of the law.”¹⁹³ But the better reason seems to be with the judges who dissented from this opinion. As they pointed out, the omission of the word “primary” in the statute is one which the courts cannot supply, and in the absence of that word, the statute refers to ordinary elections, that is, elections held under the law and for the choice of officers.

In Maryland, under a statute providing that “it shall not be lawful . . . for any person . . . to sell, barter, or give . . . any spirituous liquors . . . on the day of any election,” the supreme court has held that the giving of liquor in one’s own house on the day of an election, to a friend, in the course of hospitality, is a violation of the act, and subjects the party offending to the penalty prescribed.¹⁹⁴ But it is scarcely credible that the legislature could

¹⁹² Qualter v. State, 120 Ind. 92, 22 N. E. Rep. 100.

¹⁹³ State v. Hirsch, 125 Ind. 207, 24 N. E. Rep. 1062, Elliott and Coffey, JJ.,

dissenting. See, also, State v. Christman, 67 Ind. 328.

¹⁹⁴ Cearfoss v. State, 42 Md. 403.

have intended so outrageous an invasion of private right as this construction of the statute would involve. It is to be apprehended that the learned court, in this decision, has furnished a notable illustration of the maxim *qui hæret in litera hæret in cortice*.

Where the statute requires saloons to be kept closed "during the entire day of any election," the phrase quoted means the natural day of twenty-four hours, commencing and terminating at midnight. And it is not to be understood as denoting only the hours during which the polls are open.¹⁹⁵ In a case where, after the polls were closed, a licensed retailer opened his saloon and invited by-standers in to drink, it was held that he was guilty of keeping "open" a saloon on election-day, and the fact that he kept other commodities for sale in the same house, and paid a tax as a merchant, was immaterial.¹⁹⁶ And evidence that the judges of election allowed a liquor-saloon to be kept open is not admissible, as it would not excuse a violation of the law.¹⁹⁷

§ 431. Sale of Liquor on Public Holidays.

The statutes quite generally prohibit the sale of liquor on "public" or "legal holidays." If the particular enactment does not contain an enumeration of these days, the scope of the term must be determined by a reference to other parts of the statute-book. Thus, in Michigan, a general law provides that, besides certain named days, "any day appointed or recommended by the governor . . . or the president . . . as a day of fasting and prayer or thanksgiving" shall be a holiday. The governor, by proclamation, specially set apart and recommended April 30, 1889, known as "Centennial Day," to be a day of general thanksgiving. The liquor law required saloons to be closed on "all legal holidays." It was held that a saloon could not lawfully be opened on that day.¹⁹⁸ In Massachusetts, liquor cannot lawfully be sold on "Labor Day," except by licensed inn-keepers to *bona fide* guests or travelers sojourning at

¹⁹⁵ Haines v. State, 7 Tex. App. 30;
Lawrence v. State, Id. 192; Janks v.
State, (Tex. App.) 15 S. W. Rep. 815.

¹⁹⁶ Haines v. State, 7 Tex. App. 30.

¹⁹⁷ English v. State, 7 Tex. App. 171.

¹⁹⁸ People v. Ackerman, 80 Mich. 588,
45 N. W. Rep. 367.

their inns.¹⁹⁹ But where a law of the state makes the Fourth of July a holiday "for all purposes of presenting" bills and notes "for payment and acceptance," and "giving notice for their dishonor," this does not make it a legal holiday within the meaning of the act prohibiting liquor-selling on "any legal holiday."²⁰⁰ But it is held that Christmas day is a legal holiday within the scope and intendment of such a statute.²⁰¹

§ 432. Sale after Lawful Hours.

We have already seen that licensed liquor-dealers are usually required by law to close their places of business at a certain hour of the night, and prohibited to sell liquor between that time and a designated hour of the morning; and we have examined the validity of statutes and ordinances imposing such restrictions.²⁰² A requirement of this kind being peremptory, the courts are not at liberty to admit exceptions to its terms, nor will they listen to excuses for its violation. Thus, under a law which provides for the granting of restaurant licenses, and declares that such a license "shall not authorize any person to expose for sale spirituous liquors on any day between the hours of one and five o'clock in the morning," it is held that a licensee cannot keep open, between those hours, and sell liquor in connection with meals furnished to the participants in a ball, though it has long been the custom so to do.²⁰³

§ 433. Sales in Prohibited Places.

A license to keep a liquor-saloon does not authorize the holder to maintain such an establishment at any other place than that designated in the license. But where the proprietor of a hotel and restaurant procured a license to keep a dram-shop at a certain number on a certain street, which was the main street entrance to the hotel,

¹⁹⁹ Comm. v. Francis, (Mass.) 25 N. E. Rep. 836.

²⁰² *Supra*, § 236.

²⁰⁰ Ruge v. State, 62 Ind. 388.

²⁰³ *In re Whitney*, (Sup.) 3 N. Y. Supp. 838.

²⁰¹ Reithmiller v. People, 44 Mich. 280, 6 N. W. Rep. 667.

and then kept three separate bars where liquors were sold, on the ground floor of the hotel, screened off by partitions, but having direct and immediate connection by door-ways, all of which were accessible to the guests without going out of the hotel, and all of which bars were situated on the premises occupied for hotel purposes, it was held to be no violation of the law.²⁰⁴ So where an ordinance provided that no liquor shall be used or kept "in any refreshment saloon or restaurant within the city," and it appeared that the shop where the alleged offense was committed was used by the accused for the manufacture and sale of tobacco and cigars, and for the sale of strong beer by the glass, and for no other purposes, it was held that no breach of the ordinance was shown.²⁰⁵ Where the statute allows distillers and vintners to sell their products "at the place of manufacture," without license, a sale of spirits made by defendant at a place three or four hundred yards from his distillery, though on his own farm, is not legal.²⁰⁶ Similarly, a statute allowing distillers to sell at their own residence, provided the residence is "located upon the distillery premises or premises adjacent," does not protect sales by a distiller who leases, at a nominal rent, two or three narrow strips of land connecting his residence with the distillery, a mile or more distant.²⁰⁷

§ 434. Sales Made out of Territory Covered by License.

The privilege conferred by a license to sell liquor is territorially restricted. And the license affords no justification for a sale made beyond the limits to which it is applicable. For instance, a person who has a license to sell in one county, and sells in another, may be indicted for selling without a license.²⁰⁸ In cases arising under this

²⁰⁴ *City of St. Louis v. Gerardi*, 90 Mo. 640, 3 S. W. Rep. 408.

²⁰⁵ *State v. Hogan*, 30 N. H. 268.

²⁰⁶ *State v. Hazell*, 100 N. Car. 471, 6 S. E. Rep. 404.

²⁰⁷ *Creekmore v. Comm.*, (Ky.) 12 S. W. Rep. 628.

²⁰⁸ *Comm. v. Holstine*, 132 Pa. St. 357, 19 Atl. Rep. 273. Under the United

States law, notwithstanding the payment of a special tax as a retail liquor dealer at a certain town, if the dealer fills orders from another town, payment to be made there on receipt of the liquor, he must pay another tax there. *United States v. Shriver*, 23 Fed. Rep. 134; *United States v. Cline*, 26 Fed. Rep. 515.

rule, the vital question is almost always the determination of the place of the sale. And in this connection, we find the following rules established or recognized by the best authorities:—

1. When a liquor-dealer has a license from the city or county in which his store is kept, he may send out agents and take orders in any part of the state for goods to be selected and forwarded from the stock kept in such store, and he is not required to obtain a license from the authorities of each city or county in which contracts are made therefor by such agents.²⁰⁹

2. A licensed dealer who receives, at his place of business, an order for liquor from a place in which he has no license, and fills it by selecting the liquor from his stock and delivering it to an express company or other carrier to be carried to the purchaser, does not violate the license law, although the carrier agrees to collect and return the price; for the sale is made at the place where the goods are separated from the general stock and delivered to the carrier, such delivery being delivery to the consignee.²¹⁰

3. Irrespective of the place where the bargain was made or the order received, if the seller, by his own hands or the hands of his servant or agent, carries the liquor to the purchaser, without any intermediate delivery to or through a common carrier, and delivers the liquor to the purchaser at the latter's place, and there receives the pay for it, the sale is made at the place of delivery, and if the vendor is not licensed to sell there, he is indictable.²¹¹

4. If an order for liquor is given by a person in A. to an agent of a dealer, who has a license to sell liquor in B., and received by the agent subject to his principal's approval, and the liquor is put up by

²⁰⁹ *Gillen v. Riley*, 27 Nebr. 158, 42 N. W. Rep. 1054, citing *Haug v. Gillett*, 14 Kans. 140; *Williams v. Feiniman*, Id. 288; *Gill v. Kaufman*, 16 Kans. 571; *Boothby v. Plaisted*, 51 N. H. 436. See, also, *United States v. Durham*, 33 Fed. Rep. 834.

²¹⁰ *Fleming v. Comm.*, 130 Pa. St. 138, 18 Atl. Rep. 622; *Dunn v. State*, 82 Ga. 27, 8 S. E. Rep. 806; *Brechwald v. People*, 21 Ill. App. 213; *Pilgreen v. State*, 71 Ala. 368; *State v. Carl*, 43 Ark. 353,

51 Am. Rep. 565; *Smith v. State*, (Ark.) 16 S. W. Rep. 2; *State v. Hughes*, 22 W. Va. 743. But see *Comm. v. Burgett*, 136 Mass. 450.

²¹¹ *Comm. v. Greenfield*, 121 Mass. 40; *People v. Capen*, 26 Hun, 377; *Comm. v. Holstine*, 132 Pa. St. 357, 19 Atl. Rep. 273; *Bagley v. State*, 82 Ga. 786, 9 S. E. Rep. 721; *Bryant v. State*, (Tenn.) 15 S. W. Rep. 233; *Yowell v. State*, 41 Ark. 355; *Blackwell v. State*, 42 Ark. 275; *State v. Houts*, 36 Mo. App. 265.

the seller, directed to the buyer at A., and delivered to a carrier at B., the sale is regarded as made at B., and is not unlawful.²¹²

5. In a case such as that last supposed, the *agent* is not indictable for making an unlawful sale, unless a local statute ordains differently.²¹³ But an agent of a liquor-dealer in another state, who there receives an order for liquor, and, under authority from his employer to receive or reject orders, accepts the order, may be indicted for an unlawful sale in the state where the liquor, pursuant to his direction, is delivered to the buyer.²¹⁴

In a case in Vermont, it appeared that the respondent, a citizen of New Hampshire, having his only place of business in that state, there contracted to sell to a resident of Vermont a part of a cask of brandy which was then in Vermont in transit from New York to New Hampshire. The purchaser, by permission of the respondent, obtained the cask from the railroad station in Vermont, where it then was, and took it to his residence, where he was to take from it what he wanted, and carry the cask, with what remained, to the respondent's store in New Hampshire, where the quantity taken was to be ascertained, by a measurement of what remained, and be there paid for. On this state of facts, it was held that there had been an unlawful sale of the liquor in violation of the laws of Vermont.²¹⁵ But where one purchases liquor, without a prohibited district, for another person at his request, with his own money, and delivers it to such person within the prohibited district, making no profit, he is not guilty of a sale within such district.²¹⁶

§ 435. Sales near Churches, Schools, Fairs, etc.

In several of the states, general or special acts prohibit the sale of liquor within a prescribed distance of any church, or of certain des-

²¹² Frank v. Hoey, 128 Mass. 263; Gross v. Scarr, 71 Iowa, 656, 33 N. W. Rep. 223.

²¹³ Garbracht v. Comm., 96 Pa. St. 449, 42 Am. Rep. 550; Pearson v. State, 66 Miss. 510, 6 South. Rep. 243; Newman v. State, 88 Ala. 115, 6 South. Rep. 762. "The place of sale is the point at which goods ordered or purchased are set

apart and delivered to the purchaser, or to a common carrier, who, for the purpose of delivery, represents him." Garbracht v. Comm., *supra*.

²¹⁴ Comm. v. Eggleston, 128 Mass. 408.

²¹⁵ State v. Comings, 28 Vt. 508.

²¹⁶ Du Bois v. State, 87 Ala. 101, 6 South. Rep. 381.

ignated religious edifices. In a case of the latter kind,—where the act forbade the sale of liquor within three miles of a particular Baptist church in a certain county,—it appeared that the church had been removed before the sale charged, and it was argued that, as the reason for the law had ceased, the law must be regarded as having ceased also. But the court held otherwise, saying that the statute was for the protection of the people within a three-mile radius, as well as the church.²¹⁷ But of course if the statute merely prohibited the sale within three miles of “any church,” the question would be whether there was any church within three miles of the place of sale *at the time* of the sale. When the statute designates the “Methodist and Baptist churches” in the town of D., a sale within three miles of one, though more than three miles from the other, is unlawful.²¹⁸ But an indictment cannot be supported by evidence of a sale within the prescribed distance of a house conveyed primarily for educational purposes, with permission to hold religious exercises therein on suitable occasions, which is ordinarily used for a schoolhouse, but in which there is preaching at stated intervals.²¹⁹ The prohibition of the statute in Pennsylvania, it is held, is directed to the sale of such articles as would have a tendency to produce intoxication and consequent disturbance, not articles of food which are not of that description.²²⁰ In order to make out a case under such a statute, it must be shown that there was an actual *sale*. A mere bargain for a sale, the goods to be sent by express from another town, though payment is made at the time of the contract, is not enough.²²¹

Camp-meetings also are protected from the approach of liquor-sellers, by statute, in several of the states. A law imposing a fine on any person who, during the holding of a camp-meeting, sells or gives away any liquor, without the consent of the parties in charge of such meeting, within one mile thereof, with a proviso that any person having his regular place of business within such limits shall not be required to suspend his business, is not void as in restraint of

²¹⁷ *State v. Eaves*, 106 N. Car. 752, 11 S. E. Rep. 370.

²¹⁸ *Carlisle v. State*, (Ala.) 8 South. Rep. 386.

²¹⁹ *State v. Midgett*, 85 N. Car. 538.

²²⁰ *Fetter v. Wilt*, 46 Pa. St. 457.

²²¹ *Herron v. State*, 51 Ark. 133, 10 S. W. Rep. 25.

trade, or as creating a monopoly in favor of those persons referred to in the proviso and discriminating against others, or as illegally vesting power to license in the managers of the meeting, but is a legitimate exercise of the police power, and, as such, is valid.²²²

When *educational institutions* are designated as centres, within a prescribed distance of which liquors may not be sold, it is held that the prohibition applies to the territory covered by *radii* extending in all directions, for the prescribed distance from the point at which the institution is located.²²³ And the offense may be committed by selling from a steamboat on the waters of a navigable river, if within the limit at the time.²²⁴ And the law applies to a sale made in the vacation of the institution.²²⁵ But a statute forbidding the sale of liquor within a given distance of any academy, university, or institution of learning, does not apply to common schools provided by the legislature. And this rule is applied even though such schools are taught in the building of an academy or college.²²⁶ In some of the New England states, the statutes prohibit the granting of licenses for the sale of liquor to be exercised in any building or place which is on the same street with a public schoolhouse and within four hundred feet of it. The four hundred feet are to be determined by measuring the nearest point of each building to the other, whether they are close to the line of the street or some distance from it.²²⁷ ; the lot on which the schoolhouse stands abuts on the street on which is the building in which the liquor is sold, the schoolhouse must be deemed to be on the street from which its entrances are.²²⁸ But a saloon on A. street continues to be on A. street, notwithstanding the boarding up of the A. street entrance and window, to meet the requirements of this law, and the use, afterwards, of another entrance on a side street.²²⁹

A statute making it an offense to sell liquor within two miles of

²²² Meyer v. Baker, 120 Ill. 567, 12 N. E. Rep. 79. See, also, Kramer v. Marks, 64 Pa. St. 151.

²²³ Love v. Porter, (Ala.) 9 South. Rep. 585.

²²⁴ Boyd v. State, 12 Lea, 687.

²²⁵ Tillery v. State, 10 Lea, 35.

²²⁶ Blackwell v. State, 36 Ark. 178.

²²⁷ Comm. v. Jones, 142 Mass. 573, 8 N. E. Rep. 603; *In re Liquor Locations*, 13 R. I. 733. And see, also, Comm. v. Everson, 140 Mass. 434, 5 N. E. Rep. 155.

²²⁸ Comm. v. Jenkins, 137 Mass. 572; Comm. v. Heaganey, Id. 574.

²²⁹ Comm. v. Whelan, 134 Mass. 206.

the place where an *agricultural fair* is being held, is not unconstitutional on the ground of a want of uniformity and generality in its operation.²³⁰ It is said that a place where the industrial products of a people in agriculture, manufactures, and the arts are received and placed on exhibition, for the purpose of displaying them and awarding premiums as a reward for excellence, is an agricultural fair, within the meaning of such a statute, although organized and conducted for profit.²³¹ It is further to be observed that one who sells at his permanent place of business, within the limits, is liable to the penalty, unless saved by a proviso in the statute.²³²

The neighborhood of certain *public buildings* or institutions is also, in some of the states, a prohibited district for liquor-selling. Thus, in California, the code makes it a misdemeanor to sell, give away, or expose for sale any intoxicating liquor within two miles of the state prison, or within one mile of the insane asylum or of the University of California, or in the state capitol grounds. This legislation is held valid and constitutional.²³³ So, by an act of congress, it is provided that no license for the sale of intoxicating liquor at any place within one mile of the Soldiers' Home property in the District of Columbia shall be granted.²³⁴ Where a statute prohibited the sale of liquor within three miles of a certain railroad, during the construction of the road, it was held that it was not enough, to sustain an indictment, that the sale should have been made within that distance of the line or route; but it must have been made within three miles of a part of the road then in course of construction.²³⁵ In Alabama, where the charter of a manufacturing company made it an offense to sell liquor "within four miles of the factories of said corporation," and the property of the corporation was sold under a decree in chancery, and the purchasers carried on the same business under a new corporate name, it was held that the offense of selling continued the same as before.²³⁶

²³⁰ Heck v. State, 44 Ohio St. 536, 9 N. E. Rep. 305.

²³¹ State v. Long, (Ohio,) 28 N. E. Rep. 1038.

²³² Heck v. State, 44 Ohio St. 536, 9 N. E. Rep. 305.

²³³ *Ex parte* McClain, 61 Cal. 436, 44 Am. Rep. 554. See, also, Brinson v. State, (Ala.) 8 South. Rep. 527.

²³⁴ 26 U. S. Stat. at L. p. 797.

²³⁵ State v. Hampton, 77 N. Car. 526.

²³⁶ Ashurst v. State, 79 Ala. 276.

CHAPTER XIX.

INDICTMENTS UNDER THE LIQUOR LAWS.

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PART I. GENERAL PRINCIPLES.

§ 436. Scope of the Chapter.

It would be foreign to the plan of the present work to introduce a discussion of the general subject of criminal pleading. The learned reader is supposed to be already familiar with the accepted rules and principles which are applicable to the drawing of indictments in general and to the determination of their legal sufficiency. And our present purpose is merely to recount and examine the decisions which have been made with special reference to the prosecution of offenses committed under the liquor laws of the various states. In the first part of this chapter, therefore, we shall examine certain general principles of the law of indictments, which have received special or peculiar attention, or which require special elucidation, in their application to these statutory misdemeanors. And in the second part, we shall consider in detail the rules established for the charging of the various specific offenses under the liquor statutes and for alleging the component elements of the particular crime.

§ 437. Certainty.

When we speak of the requirement of "certainty" in an indictment, we mean that the facts constituting the basis of the prosecution must be stated with such a degree of clearness, explicitness, and detail that the accused may understand, without reasonable hesitation, exactly what charge he is called upon to meet, and may prepare his defense with a view thereto; that he may be enabled to plead the judgment in bar of a second prosecution for the same offense; and that the court may be informed of the facts alleged, so as to determine whether they are sufficient in law to support a conviction should one be had.¹ These objects being general, there is no difference, in respect to the certainty required, between common law offenses and statutory crimes, though in the forms of pleading there may be important differences. A person indicted for selling liquor contrary to law is not legally entitled to a more minute detail of statement of the facts necessary to constitute the offense, in the indictment, than he would be in an indictment at common law.² But it is clearly necessary that an indictment, under these statutes, should set forth the particular acts alleged as constituting a violation of the law.³ This may sometimes be accomplished by the use of a descriptive term having a settled and familiar meaning. Thus, it has been held that charging the defendant with "keeping a tippling-house" is a sufficient compliance with this requirement.⁴ But usually, the facts must be set out. For instance, an indictment for selling spir-

¹See *United States v. Cruikshank*, 92 U. S. 558; *United States v. Bennett*, 16 Blatchf. 350; *Scales v. State*, 47 Ark. 476, 1 S. W. Rep. 769, 58 Am. Rep. 768.

²*State v. Wooley*, 59 Vt. 357, 10 Atl. Rep. 84. See *Roberson v. Lambertville*, 38 N. J. Law, 69. In Michigan, it is said that, the liquor law having gone very far, in the form prescribed, in removing the requirements of specific averments, the courts will not assume that the door was intended to be opened any wider than the statute allows; and

a declaration which is neither a good common law declaration nor sufficient under either the general statute for the recovery of penalties or the specific provision of the particular act, cannot be sustained. *Benalleck v. People*, 31 Mich. 200.

³*State v. Cox*, 29 Mo. 475; *Comm. v. White*, 18 B. Mon. 492; *Bridgeford v. Lexington*, 7 B. Mon. 47.

⁴*Comm. v. Riley*, 14 Bush, 44. But see, *per contra*, *Bush v. Republic*, 1 Tex. 455.

ituous liquors without a license, which alleges merely that the defendant sold such liquors in less quantities than a quart, without stating other facts tending to identify the transaction, is not sufficient.⁵ And if the same transaction may constitute either of two offenses, according to the presence or absence of a particular fact, (as, whether the liquor was sold to be drunk on or off the premises,) that fact should be affirmed or denied as the case may be.⁶ It is scarcely necessary to add that, to make the indictment sufficiently certain, the time and place of the offense should be laid, and should be repeated, by the use of the phrase "then and there," before subsequent material allegations.⁷ The necessity and sufficiency of averments of time and place, kind and quantity of liquor sold, price, and name of purchaser, which have an important bearing on the question of certainty, will be discussed in detail in later sections of this chapter.

§ 438. Following the Statute.

As a general rule, in charging a statutory misdemeanor, it is sufficient to set forth the offense in the language of the statute. But this rule must be followed with great caution. For the pleader, by following the words of the statute too closely, may be led into a disjunctive allegation which will expose the indictment to the charge of uncertainty, or a conjunctive allegation which will make it assailable on the ground of duplicity. The general rule does not mean that it is sufficient to copy the statute into the indictment. The indictment must make a specific application of the general terms of the statute to the case in hand, and charge a particular person with a particular offense within those terms, and go into detail far enough to render the particular instance of offending certain.⁸ And where the statute simply designates the offense, and does not in express terms name its constituent elements, the indictment must sometimes be expanded beyond the statutory terms.⁹ Where the statute itself

⁵ Alexander v. State, 29 Tex. 495.
See State v. Smith, 35 Tex. 132; State
v. Ratner, 44 Kans. 429, 24 Pac. Rep.
953.

⁶ State v. Auberry, 7 Mo. 804.

⁷ See State v. Hopkins, 5 R. I. 53.

⁸ State v. Crooker, 95 Mo. 389, 8 S.
W. Rep. 422.

⁹ State v. Gavigan, 86 Kans. 327, 13
Pac. Rep. 554.

prescribes the form to be followed in indictments, it will be sufficient to use such form; provided, however, it contains enough to satisfy the constitutional right of the defendant to "be informed of the nature and cause of the accusation against him." Although the indictment may be in the prescribed form, yet if it does not describe any offense punishable by the statute, it cannot be sustained.¹⁰ But subject to this constitutional provision, an indictment is sufficient if it follows the form given in the statute, and it is not to be tested by common law rules as to certainty. In such a case, it is no objection to the indictment that it would be bad at common law, provided it is not repugnant to the constitution.¹¹

§ 439. Disjunctive Allegations.

It is said that "or" is a dangerous word to use in an indictment. The reason is that it is extremely liable to make the statement of the offense uncertain. When its effect is to render it doubtful which of two or more acts, articles, or agencies is intended to be alleged, its use is fatal to the indictment. Hence the need of special caution in following the language of the statute where this word is employed. There is but one case in which it is safe to copy the disjunctive from the statute; viz., where "or" is used in the statute in the sense of "to wit," that is, where that which follows it is merely descriptive or explanatory of that which precedes, so that the two are identical or equivalent. If the two things separated by this word are different things, the pleader must allege only one of them or use the conjunctive "and." These principles are amply illustrated by decisions dealing with our particular subject-matter. Thus, an indictment which alleges an unlawful sale of "spirituous *or* intoxicating liquor," or of "ardent *or* intoxicating liquor," or of "ale and beer *or* wine," following the language of the statute, is bad for uncertainty.¹² So is an indictment alleging that liquor was "kept *or* deposited by" the defendant "*or* by some other person with his consent."¹³ And so is an

¹⁰ State v. Learned, 47 Me. 426.

¹¹ State v. Murphy, 15 R. I. 543, 10 Atl. Rep. 585; State v. Comstock, 27 Vt. 553.

¹² Comm. v. Grey, 2 Gray, 501, 61 Am.

Dec. 476; Clifford v. State, 29 Wis. 327.

¹³ State v. Moran, 40 Me. 129.

indictment charging that the accused "did sell or suffer to be sold," etc.¹⁴ So, under a statute providing that no druggist shall "sell, give away, or otherwise dispose of intoxicating liquors," an indictment charging, in the disjunctive, that the defendant "did unlawfully sell or give away and dispose of intoxicating liquors," is fatally defective.¹⁵

§ 440. Duplicity.

In criminal pleading, duplicity is the fault of charging two or more distinct offenses in the same count. That the rule against duplicity is applicable to indictments under the liquor law is well recognized. Thus, a statute providing that a person shall not sell "any wines or spirituous liquors in less quantities than one gallon, nor suffer the same or any part thereof" to be used on the premises, states two distinct offenses, and one count, setting out the words of the statute, charges two offenses and is bad for duplicity.¹⁶ But if the allegation of one of the offenses is legally insufficient, or shows a lack of jurisdiction in the court, it may be rejected as surplusage, and this relieves the count of the charge of duplicity. This is the case where an indictment alleges the keeping of two liquor nuisances, but describes one of them as in another county.¹⁷ So, in an indictment for selling liquor on Sunday, an averment that defendant had no license is merely surplusage, and does not render the indictment bad for duplicity.¹⁸ Again, it is a rule that, where two or more acts are so connected that each represents a stage in the same offense, though each act alone would constitute an offense, they may be coupled in one count. Hence a complaint charging that defendant, not being licensed, owned and kept liquors with intent to sell them, exposed and offered them for sale, and sold them, is not bad for duplicity, although each of the several acts charged was itself specifically forbidden by the statute.¹⁹ Further, it must be remembered that a statutory offense may be single, although it may require, or admit,

¹⁴ State v. Colwell, 3 R. I. 284.

¹⁵ State v. Fairgrieve, 29 Mo. App. 641. And see Raisler v. State, 55 Ala. 64.

¹⁶ Miller v. State, 5 How. (Miss.) 250.

See State v. Ball, 27 Nebr. 601, 43 N. W. Rep. 398.

¹⁷ State v. Smouse, 50 Iowa, 43.

¹⁸ State v. Hutzell, 58 Ind. 160.

¹⁹ State v. Burns, 44 Conn. 149. And

several distinct acts as its constituent elements. Thus, an indictment charging sales of twenty glasses or drams to divers persons at divers times, charges but one offense; viz., the "retailing of intoxicating liquors by the dram."²⁰ And where the statute defines the offense as committed in a certain mode *or* in a certain other mode, the indictment may charge the offense, in the language of the statute, to have been committed in both these modes.²¹ And again, there is no objection to the use of several terms to designate one and the same place. Thus, where the statute declares "all grog-shops, tippling-shops, or buildings, places, or tenements" used for the illegal sale of liquors to be nuisances, an indictment thereunder may charge the keeping of "a certain grog-shop and tippling-shop and building, place, and tenement" used for the illegal sale of liquors.²²

§ 441. Conjunctive Allegations.

It is a general rule that where several cognate acts are forbidden in the statute, disjunctively, the complaint or indictment may ordinarily charge them all conjunctively in a single count, if the reference is to one transaction, for which a single penalty is incurred.²³ In accordance with this rule, it is held that if the statute makes it an offense for any one to "sell *or* give away" intoxicating liquors, the indictment may charge that the defendant "did sell *and* give away" such liquors, without being open to the charge of duplicity.²⁴ And the same is true of an indictment charging both a selling and barter-

see *Luton v. Palmer*, 69 Mich. 610, 37 N. W. Rep. 701; *People v. Paquin*, 74 Mich. 34, 41 N. W. Rep. 852.

²⁰ *Zumhoff v. State*, 4 Greene, (Iowa.) 526; *Comm. v. Broker*, 151 Mass. 355, 23 N. E. Rep. 1137.

²¹ *State v. Plastringe*, 6 R. I. 76.

²² *State v. Brady*, 16 R. I. 51, 12 Atl. Rep. 238; *State v. Tracey*, 12 R. I. 216; *Conley v. State*, 5 W. Va. 522.

²³ *State v. Nolan*, 15 R. I. 529, 10 Atl. Rep. 481, citing *State v. Wood*, 14 R. I. 151; *State v. Schweiter*, 27 Kans. 499; *Comm. v. Eaton*, 15 Pick. 273; *Comm.*

v. Foss, 14 Gray, 50; *Comm. v. Nichols*, 10 Allen, 199; *Comm. v. Curran*, 119 Mass. 206; *Comm. v. Dolan*, 121 Mass. 374; *United States v. Hull*, 14 Fed. Rep. 324; *Comm. v. Miller*, 107 Pa. St. 276.

²⁴ *State v. Brown*, 36 Vt. 560; *Boldt v. State*, 72 Wis. 7, 35 N. W. Rep. 935, 38 N. W. Rep. 177; *State v. Ball*, 27 Nebr. 601, 43 N. W. Rep. 398; *State v. Pittman*, 76 Mo. 56. But compare *State v. Pischel*, 16 Nebr. 490, 20 N. W. Rep. 848; *Smith v. State*, (Nebr.) 48 N. W. Rep. 823.

ing in the same count.²⁵ And so of an allegation that defendant did "offer to sell, sell, and suffer to be sold."²⁶ And so of a charge that he "did presume to be a retailer, and did sell" to a person named.²⁷ And so of an allegation that the defendant "unlawfully did sell, and was interested in the sale of, alcoholic, ardent, and vinous liquors and intoxicating spirits."²⁸ And there is no duplicity in charging that he "did sell, and did offer to sell, by himself and by an agent."²⁹ In pursuance of the same principle, it is held that if the statute prohibits the sale of several enumerated kinds of liquor, in the disjunctive, the indictment may properly allege the sale of each and all of them. Hence it is permissible, and quite common, following the language of the statute, but with the substitution of "and" for "or," to charge the sale of "spirituous, vinous, and malt liquors," or "fermented and distilled" liquors, or otherwise according to the terms of the law.³⁰

§ 442. Joinder of Counts.

The general rule that two or more offenses of the same grade, punishable with similar penalties, committed in the same jurisdiction by the same defendant, and belonging to the same general group or class of crimes, may be joined in separate counts of the same indictment, applies to prosecutions for violations of the liquor laws.³¹ Thus, under the statute in Massachusetts, a count charging the defendant with being a common seller of intoxicating liquors may be included in the same indictment with counts charging distinct sales to particular persons.³² A count for maintaining a nuisance may be joined with one or more counts charging particular illegal sales of

²⁵ State v. Teahan, 50 Conn. 92; State v. Schweiter, 27 Kans. 499.

²⁶ State v. Nolan, 15 R. I. 529, 10 Atl. Rep. 481.

²⁷ Comm. v. Wilcox, 1 Cush. 503.

²⁸ Davis v. State, 50 Ark. 17, 6 S. W. Rep. 388.

²⁹ Barnes v. State, 20 Conn. 232.

³⁰ State v. Cottle, 15 Me. 473; State v. Whitted, 3 Ala. 102; Lea v. State, 64 Miss. 201, 1 South. Rep. 51; Kreamer v.

State, 106 Ind. 192, 6 N. E. Rep. 341; State v. Nations, 75 Mo. 53.

³¹ See State v. Klein, 78 Mo. 627; Comm. v. Bearce, 150 Mass. 389, 23 N. E. Rep. 99; Walters v. State, 5 Iowa. 507; State v. Atkinson, (S. Car.) 11 S. E. Rep. 693; Pope v. People, 26 Ill. App. 44.

³² Comm. v. Moorehouse, 1 Gray, 470; Comm. v. Clark, 14 Gray, 367; Comm. v. Gillon, 2 Allen, 505.

liquor.³³ And a charge of selling liquor within the prohibited distance of an institution of learning may be joined with a charge of selling without taking the oath not to mix or adulterate liquors.³⁴ But on the other hand, it is said that where two counts of an indictment charge a sale of liquor without license, and another count charges a violation of the local option law, the two sets of counts are irreconcilably repugnant, and the indictment is insufficient in law.³⁵ In New York, the code of procedure provides that each indictment shall charge but one crime, except that a crime may be alleged in separate counts as committed in a different manner, and where the act complained of constitutes different crimes, such crimes may be charged in separate counts.³⁶ It is held to be a violation of this statutory rule when an indictment charges sales of liquor in the same town, at different times and to different persons, each sale being alleged in a separate count.³⁷ But where an indictment charged in one count that defendant sold liquor in quantities less than five gallons to a certain person, at a certain time and place, without a license, and a second count alleged that he sold liquor to be drunk on the premises to the same person at the same time and place, in violation of two distinct sections of the statute respectively, it was held that if there was a sale of less than five gallons to be drunk on the premises, it was a crime under both such sections, and might be charged in separate counts, as the case came within the proviso to the statutory rule of pleading.³⁸

§ 443. Surplusage.

The familiar rules in regard to the character and tests of surplus matter, and the rejection or disregarding it when found in an indictment, apply to prosecutions under the liquor laws. Surplusage does

³³ *State v. McLaughlin*, (Kans.) 27 Pac. Rep. 840.

³⁴ *Tillery v. State*, 10 Lea. 35.

³⁵ *Butler v. State*, 25 Fla. 347, 6 South. Rep. 67.

³⁶ *Code Crim. Proc. N. Y.* §§ 278, 279.

³⁷ *People v. O'Donnell*, 46 Hun, 358. So also, an indictment charging, in one

count, a sale to E. L. and divers others on Sunday, Feb. 26, and, in another count, the giving of liquor to divers persons on Sunday, March 18. *People v. Harmon*, 49 Hun, 558, 2 N. Y. Supp. 421.

³⁸ *People v. Charbineau*, 115 N. Y. 433, 22 N. E. Rep. 271.

not vitiate a complaint or indictment founded on such statutes.³⁹ Thus, an indictment alleging that the respondent was a common seller of liquors on a day named, and on divers days and times between that day and the finding of the indictment, is not bad, although offenses committed during a portion of that time are punishable under one statute, and during the remaining portion, under another and later statute; for the allegation concerning "divers other days," etc., may be rejected as surplusage.⁴⁰

§ 444. Negating Exceptions and Defenses.

It is a general and well-recognized rule that where the enacting clause of the statute describes the offense with certain exceptions, it is necessary to state, in the indictment, all the circumstances which constitute the offense and to negative the exceptions; but where there are exceptions or provisos contained in separate and subsequent clauses or provisions of the statute, or in another statute, they need not be noticed in the indictment, but the defendant may show them in his defense.⁴¹ But a negative, or exception, or proviso, which is descriptive of the offense, as distinguished from one which affords matter of excuse merely, must be met by an allegation in the indictment, irrespective of the question of its position in the statute.⁴² That these rules are applicable to the case of indictments for violations of the liquor laws will be seen from the cases collected in the margin,⁴³ as well as from the following illustrations. Where the enacting clause of the statute is: "No person shall sell . . . except," etc., the indictment must severally set out and negative the exceptions.⁴⁴ So, under an act making it an offense to sell liquor

³⁹ State v. Hall, 26 W. Va. 236; State v. Staples, 45 Me. 320; Comm. v. Penniman, 8 Metc. (Mass.) 519.

⁴⁰ State v. Pillsbury, 47 Me. 449.

⁴¹ United States v. Britton, 107 U. S. 670, 2 Sup. Ct. Rep. 512; United States v. Cook, 17 Wall. 173; State v. McGlynn, 34 N. H. 422; 1 Bishop, Crim. Proc. §§ 631-642; Chitty, Crim. Law, 283, 284; Wharton, Crim. Plead. § 240.

⁴² State v. Abbey, 29 Vt. 60, 67 Am.

Dec. 754; State v. Miller, 24 Conn. 523; State v. Keen, 34 Me. 500.

⁴³ State v. Lane, 33 Me. 536; Comm. v. Burding, 12 Cush. 506; Comm. v. Hill, 5 Gratt. 682; Comm. v. Young, 15 Gratt. 664; State v. Thompson, 2 Kans. 432; Brutton v. State, 4 Ind. 601; Kinser v. State, 9 Ind. 543; State v. Curley, 33 Iowa, 359; State v. Buford, 10 Mo. 703.

⁴⁴ State v. O'Donnell, 10 R. I. 472.

without the prescription of a graduated physician or regular practitioner of medicine, the indictment must negative the prescription of both.⁴⁵ But where the statute, in its first section, prohibits the sale of intoxicating liquors under certain circumstances, and, in a proviso at the end of a subsequent section, allows the sale of "wine manufactured of the pure juice of the grape cultivated in the state, or beer, ale, or cider," it is not necessary to a perfect description of the offense, as defined in the first section, that the indictment should allege that the liquor sold was not of the excepted classes; the benefits of the proviso, if applicable to the case, must be taken advantage of by the accused in making his defense upon the facts.⁴⁶ So, where the statute contains a proviso that its terms shall not apply to incorporated towns and cities, it is not necessary to aver that the offense was not committed in a town or city; for that is not a part of the description of the offense, but only matter of defense.⁴⁷ Nor is it necessary to negative a proviso in the act, exempting from its operation all sales made to town agents within a certain time after the act took effect or sales by one agent to another at any time.⁴⁸ In a complaint, under a statute, for not keeping a saloon closed after nine o'clock at night, it is not necessary to negative any action by the town council extending the time for closing until ten o'clock, as permitted by a proviso in the act.⁴⁹

§ 445. Same; Exception as to Druggists.

If the statute prohibits the sale of liquors under certain circumstances, and, in another section or in a proviso, authorizes druggists or apothecaries to sell for certain purposes or under certain conditions, it is not necessary, in an indictment on the statute, to allege that the defendant is not a druggist.⁵⁰ And *a fortiori*, the indictment need not negative the existence of those facts which, under a

⁴⁵ Thompson v. State, 37 Ark. 408.

⁴⁶ Becker v. State, 8 Ohio St. 391.
And see, also, State v. Shaw, 35 N. H. 217.

⁴⁷ State v. Tamlar, 19 Oreg. 528, 25 Pac. Rep. 71.

⁴⁸ State v. Wade, 34 N. H. 495.

⁴⁹ People v. Richmond, 59 Mich. 570, 26 N. W. Rep. 770.

⁵⁰ State v. Taylor, 73 Mo. 52; Bogan v. State, 84 Ala. 449, 4 South. Rep. 355; People v. Robbins, 70 Mich. 130, 37 N. W. Rep. 924; People v. Sullivan, 83 Mich. 355, 47 N. W. Rep. 220.

subsequent statute, authorize a druggist to sell without a license.⁵¹ But if the exception as to druggists were in the enacting clause,—as, if the statute should provide that “it shall not be lawful for any person, except druggists, to sell any liquor without a license,”—it would seem, under the rule stated in the preceding section, that this should be met by a negative allegation in the indictment. For here the fact that the defendant is not a druggist is as much a part of the offense as the fact that he has no license. But there are authorities which deny even this.⁵² But if the pleader undertakes to negative the authority of the defendant as a druggist, he must be careful to make his allegation as broad, as specific, and as certain as the language of the statute. For example, if the statute provides that its terms shall not apply to “druggists who sell liquor for chemical, scientific, medicinal, mechanical, or sacramental purposes only, and in strict compliance with law,” an allegation that the defendant did unlawfully sell liquor, the said defendant “not being then and there a druggist,” does not sufficiently charge that he was not within the excepted class.⁵³

§ 446. Same; Exception as to Particular Uses.

If the same section or clause of a statute which prohibits the sale of intoxicating liquors contains also an exception in favor of their sale for certain permitted uses, then the indictment must meet the exception with a negative allegation. Thus, where the act forbids the sale of liquor without license “except such as shall be compounded and intended to be used as a medicine,” the indictment must negative this exception.⁵⁴ And the rule is similar if the exception, permitting sales for medical and pharmaceutical purposes, points directly to the character of the offense and makes a part of

⁵¹ State v. Jaques, 68 Mo. 260.

⁵² Surratt v. State, 45 Miss. 601.

⁵³ People v. Haas, 79 Mich. 449, 44 N. W. Rep. 928. And, under the same statute, an allegation that defendant was not “a druggist, nor a person whose business was at that time to sell

drugs and medicines.” is no better. People v. Decarie, 80 Mich. 578, 45 N. W. Rep. 491.

⁵⁴ Roberson v. City of Lambertville, 38 N. J. Law, 69; State v. McAdoo, 80 Mo. 216; State v. Scarlett, 38 Ark. 563; State v. Abbott, 31 N. H. 434.

the description of it.⁵⁵ But if the exception is contained in a different section or part or proviso of the statute, then, in accordance with the rules already stated, it is not necessary to aver that the sale was not for any of the permitted purposes.⁵⁶ And it appears to be the doctrine of the federal courts that, even where the exception is in the enacting clause, still, if it is not "so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted," then it is not necessary to allege that the accused is not within the exception.⁵⁷ Hence it is not necessary, in an indictment for a violation of the act of congress forbidding the sale of intoxicating liquor in Alaska, to allege that such sale was not made for mechanical, medicinal, or scientific purposes.⁵⁸

§ 447. Same; Exception as to Imported Liquors.

In several of the states, the statutes provide that "it shall be unlawful and criminal for any person to sell or keep for sale any spirituous or intoxicating liquor, . . . provided that nothing in this act contained shall be construed to prevent . . . the sale or keeping for sale, by the importer thereof, in the original casks or packages in which it was imported, of foreign spirituous or intoxicating liquor, imported under the authority of the laws of the United States," or in substantially similar language. In a prosecution under such a statute, it is not necessary for the indictment to negative the hypothesis that the sale complained of was made by an importer in such original casks or packages.⁵⁹ If such was the case, it is a matter of defense to be set up by the accused. On a similar principle, where the statute prohibits the sale without license of

⁵⁵ *Hirn v. State*, 1 Ohio St. 15.

⁵⁶ *State v. Beneke*, 9 Iowa, 203; *State v. Duggan*, 15 R. I. 403, 6 Atl. Rep. 787; *Townley v. State*, 18 N. J. Law, 311; *Baeumel v. State*, (Fla.) 7 South. Rep. 371.

⁵⁷ *United States v. Cook*, 17 Wall. 173.

⁵⁸ *Nelson v. United States*, 30 Fed. Rep. 112.

⁵⁹ *State v. McGlynn*, 34 N. H. 422; *State v. Fuller*, 33 N. H. 259; *State v. Blaisdell*, Id. 388; *State v. Gurney*, 37 Me. 149; *Comm. v. Edwards*, 12 Cush. 187; *Comm. v. Purtle*, 11 Gray, 78; *Comm. v. Gagne*, (Mass.) 26 N. E. Rep. 449; *Comm. v. Gay*, (Mass.) 26 N. E. Rep. 571.

domestic spirituous liquors in any quantity whatever, and of imported liquors in any quantity less than that which the revenue laws of the United States allow to be imported, it is held that an indictment charging the defendant with selling liquors without license, in a quantity less than the revenue laws allow to be imported, need not specify whether the liquors sold were imported or domestic.⁶⁰

§ 448. Negating License or Authority to Sell.

The question whether or not the indictment must contain an allegation denying the existence of a license or authority in the defendant to make the sale of liquor complained of, depends upon whether the fact of his being an unlicensed person is or is not a necessary ingredient of the offense charged. If the very point of the alleged crime is that the sale was made by a person who was not authorized to sell, it is clearly necessary that the indictment should charge, in appropriate terms, that the defendant had no license or permit.⁶¹ Nor is the rule altered by the fact that the requirement of a license, to justify a sale, may appear by way of exception in the enacting clause of the statute,—as, where the act provides that “it shall be unlawful for any person, *except* a person duly licensed therefor,” to sell intoxicating liquors. Here the offense sought to be charged, unlawful selling, could not be fully described without a reference to the exception. And therefore it is not of that class of exceptions which the law leaves to be set up by the accused. On the contrary, the fact that there was no license to cover the sale is an essential element of the offense. But a complaint alleging that the defendant kept a tippling-house is held to be good under the statute in Kentucky, and an additional averment that it was kept without a license to keep a tavern is unnecessary.⁶² But on the other hand, if the question of a license is not material to the offense, if the elements of

⁶⁰ State v. Crowell, 30 Me. 115.

⁶¹ State v. Savage, 48 N. H. 484; Comm. v. Thurlow, 24 Pick. 374; Comm. v. Hampton, 3 Gratt. 590; Koopman v. State, 61 Ala. 70; State v. Horan, 25 Tex. Supp. 271; Howe v.

State, 10 Ind. 423; State v. Carpenter, 20 Ind. 219. See Comm. v. Tuttle, 12 Cush. 502.

⁶² Comm. v. Harvey, 16 B. Mon. 1; Comm. v. Allen, 15 B. Mon. 1.

the offense are complete without the additional fact of the sale having been unlicensed, or if the act charged amounts to an offense whether committed by a licensed or unlicensed person, then no averment in regard to a license is needed. Thus, on an indictment for selling intoxicating liquor to a minor, it is wholly immaterial whether the defendant had a license or not, and therefore no allegation on that point is necessary.⁶³ So, on an indictment for selling liquor on Sunday, it is not required that there should be an averment negating defendant's license to sell, because the license would not authorize a sale on that day.⁶⁴ And the same is true of an indictment for maintaining a liquor nuisance.⁶⁵ And it is also held that an indictment for selling liquor without a license need not allege that the owner of the liquor sold had no license; if defendant acted as the agent of a licensed owner, he can show that fact on the trial.⁶⁶

§ 449. Form of Allegation Denying License.

In regard to the form of words to be used in an allegation denying the license or authority of the defendant to make the sale complained of, it is to be observed that this may generally be done in either of three ways: (1) by denying particularly the existence of each sort of license which might have justified the sale, with a specific reference to each of the sources from which such license might have been derived; (2) by negating the existence of some particular variety of license, with the addition of a general averment negating any license or authority; (3) by the use of a general formula, without specific reference to kinds or sources of license.

In the first place, it must be noted that, *if the pleader attempts to negative the various forms of license severally by name*, he must include *all* the different forms of license by which the privilege of selling liquor may be granted. For instance, if the allegation charges the selling "without taking out or then having a license as a grocer, dram-shop-keeper, or tavern-keeper," whereas the authorities have

⁶³ Johnson v. State, 74 Ind. 197.

⁶⁵ State v. Collins, 11 Iowa, 141.

⁶⁴ Lehrtritter v. State, 42 Ind. 383; Stein v. State, 50 Ind. 21.

⁶⁶ State v. Devers, 38 Ark. 517.

power to grant a license to a "saloon-keeper" or "liquor-seller," the indictment is not sufficient.⁶⁷ So, in Indiana, an indictment for selling liquor "not having procured a license therefor from the commissioners of the county," is bad; for it does not negative the procurement of a license from the circuit court, which may be done on an appeal from the commissioners' refusal to grant a license.⁶⁸ So again, an indictment charging that the defendant sold liquor "in the town of Jacksonville, Neosho county . . . without taking out and then having a license . . . [from the tribunal transacting the county business of said county of Neosho]" is not sufficient; the words in brackets should be omitted, or the words "or from the council of any incorporated town or city," or some other words which would show that the liquor was not sold in any incorporated town or city under license from the city council, should be added.⁶⁹ But if the complaint is for the violation of a city ordinance providing for the grant of licenses, so that the defendant could not defend on the ground of his having a state or county license, no reference to such state or county license is necessary.⁷⁰ Further, the reader will observe that if the indictment professes to follow the language of the statute, in this particular, it is essential that its terms should be at least as broad as those of the law. Thus, if the statute prohibits the sale of intoxicating liquor to be drunk in any of various enumerated places, an allegation merely that defendant had no license to sell such liquor to be drunk "on the premises" is not sufficient.⁷¹ It should also be noticed that the strictness of this rule may be relaxed in cases where the particular kind of license omitted from the negative allegation is one which could not possibly have protected the defendant in the specific violation of law of which complaint is made. Thus, in an

⁶⁷ State v. Pitzer, 23 Kans. 250; State v. Haden, 15 Mo. 447.

⁶⁸ Meier v. State, 57 Ind. 386; Henderson v. State, 60 Ind. 296; O'Brien v. State, 63 Ind. 242. But in New Hampshire, in an indictment for selling liquor in less quantity than a gallon, without a license from the selectmen of the town, it is not necessary to allege that there were selectmen, nor that the per-

son so selling had no license from the court of common pleas. State v. Adams, 6 N. H. 532.

⁶⁹ State v. Pittman, 10 Kans. 593.

⁷⁰ Frankfort v. Aughe, 114 Ind. 77, 15 N. E. Rep. 802.

⁷¹ Burke v. State, 52 Ind. 461, 522. See Sires v. State, 73 Wis. 251, 41 N. W. Rep. 81.

indictment for selling liquors to be used in and about the premises of the seller, it is not necessary to allege that he was not licensed to sell for mechanical and medical purposes.⁷²

Secondly, the indictment may negative the existence in the defendant of some particular kind of a license, adding a general phrase denying *all* license or authority. Thus, in Missouri, a form much in use is: "Without his then and there having a dram-shop-keeper's license, inn-keeper's license, or any other legal authority to sell said intoxicating liquor at said place, in manner and form aforesaid, contrary," etc. And this is held sufficiently broad.⁷³ And where such a formula is employed as "without having obtained a license as a tavern-keeper *or* without being in any way authorized," etc., it is ruled that the use of the disjunctive particle "*or*" furnishes no ground of objection to the indictment, for it does not render the statement of the offense uncertain.⁷⁴ Further, the addition of such a general phrase will sometimes save the indictment from an objection to one or more of the particular specifications. Thus, under a complaint charging a sale of liquor by defendant, he not being authorized to sell under the provisions of a cited statute, which had been repealed, nor by any legal authority whatever, it was held that the allegation as to the statute might be rejected as surplusage.⁷⁵

Thirdly, in some of the states, (though perhaps not in all,⁷⁶) the courts will accept an allegation which merely denies the defendant's right or authority to sell, by the use of a general formula, without specific references to statutes or to particular kinds of license. All the following forms have been held *good*, as sufficiently negating the defendant's right to sell in any mode permitted or not prohibited by law:—

"Without then and there having any license, appointment, or

⁷² Comm. v. Shaw, 5 Cush. 522.

⁷³ State v. Sutton, 25 Mo. 300; State v. Hornbeak, 15 Mo. 478; State v. Fanning, 38 Mo. 359.

⁷⁴ People v. Gilkinson, 4 Park. Crim. 26.

⁷⁵ Comm. v. Peto, 136 Mass. 155.

⁷⁶ In Vermont, it has been ruled that the indictment ought to allege that the

respondent was not authorized to sell liquors in any mode designated by the statute, particularly negating each source from which he might have obtained a license. State v. Sommers, 3 Vt. 156. But compare State v. Clark, 23 Vt. 293. See, also, State v. Webster, 10 N. J. Law, 293.

authority therefor, first duly had and obtained as required by law in this commonwealth, and without then and there having any legal authority whatever.”⁷⁷

“Without being duly authorized and appointed thereto according to law.”⁷⁸

“Without having any legal appointment or authority therefor.”⁷⁹

“Not having then and there any authority or appointment according to law to make such sale.”⁸⁰

“Without any authority so to do, contrary to the form of the statute.”⁸¹

“Without having a license for that purpose continuing in force, contrary to the form of the statute.”⁸²

“Not being then and there licensed according to the laws of Indiana, in force at the time, to sell intoxicating liquor at retail.”⁸³

“Not being then and there licensed according to law to vend” intoxicating liquors.⁸⁴

Where the statute makes it a misdemeanor to sell liquor without first obtaining “a license or permit therefor,” an allegation that defendant sold liquor “without first having obtained a license therefor,” and that he “had no license authorizing such sale,” is sufficient without alleging that he had no “permit,” as that word is used merely to denote a particular kind of license issued to pharmacists.⁸⁵

With particular reference to unauthorized sales by persons not licensed as town agents, in the jurisdictions where that system obtains, it is said that it is not necessary to set forth that the defendant was not appointed an agent for selling for certain purposes, etc. An averment that he was not “duly” or “legally” appointed, or “was not appointed” such agent, or that he “was not” such agent, at the time of the sale charged, is sufficient.⁸⁶ And as the authority of such

⁷⁷ Comm. v. Dunn, 14 Gray, 401; Comm. v. Wilson, 11 Cush. 412.

⁷⁸ Comm. v. Clapp, 5 Gray, 97; Comm. v. Keefe, 7 Gray, 332; Comm. v. Roland, 12 Gray, 132; Comm. v. Boyle, 14 Gray, 3; Comm. v. Clark, 14 Gray, 367.

⁷⁹ Comm. v. Lafontaine, 3 Gray, 479.

⁸⁰ Comm. v. Conant, 6 Gray, 482.

⁸¹ Norton v. State, 65 Miss. 297, 3

South. Rep. 665. See, also, Trost v. State, 64 Miss. 188, 1 South. Rep. 49.

⁸² State v. Wishon, 15 Mo. 503.

⁸³ State v. Buckner, 52 Ind. 278.

⁸⁴ Coverdale v. State, 60 Ind. 307.

⁸⁵ Neuman v. State, 76 Wis. 112, 45 N. W. Rep. 30.

⁸⁶ State v. Barker, 3 R. I. 280; State v. Johnson, Id. 94.

an agent is limited to sales made within the city or town for which he is appointed, it is unnecessary that the indictment should negative his being agent for any other city or town than that in which the sale is alleged to have been made.⁸⁷ Where two or more persons are jointly indicted, the language of this allegation should be broad enough to apply to each and all of them. But it is held that an indictment alleging that A. and B., "not being a licensed taverner or retailer," did sell, etc., sufficiently negatives the qualification of each of them.⁸⁸ And conversely, an allegation that A. and B. were not town agents is held sufficient, as it imports that neither of them was such an agent.⁸⁹

§ 450. Referring to the Statute.

If different sections of the same statute, on the subject of the liquor traffic, impose different penalties, the indictment must show on which of the sections it is founded.⁹⁰ And so, if the statute does not put all sales upon the same footing, but makes a substantial distinction, in its separate sections, in the sales which make parties responsible, although it provides the same penalties for all unlawful sales, there is a substantial reason for requiring the indictment to indicate which section the defendant is charged with violating.⁹¹ But except in such cases as these, it is sufficient to refer to the statute generally, without a reference to the section imposing the particular penalty.⁹² In Ohio, the decisions sanction the practice of indicating the law alleged to have been violated by referring to the numbered sections of the revised statutes.⁹³ And in Massachusetts, a complaint which charges an unlawful sale of intoxicating liquor "contrary to the form of the statute in such case made and provided," need not allege more specifically whether the offense was in violation of one or the other of two statutes passed in different years.⁹⁴ But if there are two statutes, one general throughout the

⁸⁷ State v. Shaw, 35 N. H. 217.

⁸⁸ State v. Burns, 20 N. H. 550.

⁸⁹ State v. Wadsworth, 30 Conn. 55.

⁹⁰ State v. Leavitt, 63 N. H. 381.

⁹¹ Benalleck v. People, 31 Mich. 200.

⁹² Kee v. McSweeney, 15 Abb. New Cas. 229.

⁹³ Oshe v. State, 37 Ohio St. 494.

⁹⁴ Comm. v. Keefe, 7 Gray, 332.

state, and the other special to a particular locality, the indictment should show which of the two the defendant is charged with violating; for otherwise it will not be sufficiently certain to bar a second prosecution for the same offense.⁹⁵ A statute which forbids any person to sell or give away intoxicating liquors within a certain county is a public statute, though of local application, and need not be specially pleaded in an indictment.⁹⁶ And the same is true of an act prohibiting the sale of liquor within a certain distance of a designated locality.⁹⁷

§ 451. Conclusion, Against the Form of the Statute.

It has been said that where one statute defines an offense against the system of excise of the state, and another statute prescribes the punishment, the indictment must conclude in the plural form, *contra formam statutorum*, or, "against the statutes in such case made and provided;" but that if the offense is fully defined, both as to its constituent elements and its punishment, in one of the statutes, although the other statute may impose another and further penalty, the indictment may well conclude in the singular form.⁹⁸ In some of the states, all indictments are required to contain an allegation that the acts complained of were "against the peace and dignity" of the state. But in some others, it is considered that this formula is not necessary to be inserted in an indictment for a statutory misdemeanor under the liquor laws.⁹⁹

§ 452. Complaint for Violation of Municipal Ordinance.

Most of the rules and principles stated in the foregoing sections will be found applicable, *mutatis mutandis*, to the case of complaints

⁹⁵ *Camp v. State*, 27 Ala. 53. See *Olmstead v. State*, 89 Ala. 16, 7 South. Rep. 775; *Seifried v. Comm.*, 101 Pa. St. 200; *Stone v. State*, (Miss.) 7 South. Rep. 500.

⁹⁶ *Powers v. Comm.*, (Ky.) 13 S. W. Rep. 450.

⁹⁷ *State v. Wallace*, 94 N. Car. 327.

⁹⁸ *King v. State*, 2 Ind. 523; *Kane v. People*, 8 Wend. 212; *Butman's Case*, 8 Me. 113; *State v. Robbins*, 1 Strobb. 355; *State v. Dayton*, 23 N. J. Law, 49; *State v. Wilbor*, 1 R. I. 199, 36 Am. Dec. 245.

⁹⁹ *State v. Miller*, 24 Conn. 519.

under municipal ordinances on the subject of liquor-selling. It is said that the facts constituting the offense must be set out in the complaint as fully and completely as they are required to be stated in an indictment for a similar offense against the state.¹⁰⁰ And if the complaint quotes the ordinance, but fails to show in what manner it was violated, it is defective.¹⁰¹ But if the complaint substantially follows the language of the ordinance under which the prosecution is brought, it will in general be sufficient.¹⁰² It is also held that it is sufficient to state in the complaint that the prosecutor has just cause to suspect, and does suspect, the person charged, provided the complaint in all other respects conforms to the requirements of the common law.¹⁰³

PART II. PARTICULAR AVERMENTS.

§ 453. Alleging Character or Occupation of Defendant.

If the statute upon which an indictment is founded makes the act charged an offense only when it is done by a person belonging to a particular class, or possessing a certain qualification, or pursuing a given business, so that the crime can be committed only by one who is so situated,—as, where the statute forbids the sale of liquor, under certain circumstances, by “merchants,” “licensed retailers,” “wholesale liquor-dealers,” etc.,—the indictment must show on its face that the accused comes within the class designated by the statute.¹⁰⁴ Thus, a complaint under a statute forbidding the sale of liquor after “notice to any tavern, hotel-keeper, merchant, grocer, saloon-keeper, distiller, brewer, or any other person having or keeping any such intoxicating liquors,” etc., must allege that defendant was one of the persons enumerated.¹⁰⁵ So, where one statute forbids any person to sell any

¹⁰⁰ *Cunningham v. Berry*, 17 Oreg. 622, 22 Pac. Rep. 115.

¹⁰¹ *Marietta v. Alexander*, (Ga.) 12 S. E. Rep. 681.

¹⁰² *Mankato v. Arnold*, 36 Minn. 62, 30 N. W. Rep. 305.

¹⁰³ *Roberson v. Lambertville*, 38 N. J. Law, 69.

¹⁰⁴ *State v. Ryan*, 30 Mo. App. 159;

State v. Runyan, 26 Mo. 167; *State v. Andrews*, Id. 169; *Bode v. State*, 7 Gill, 326; *State v. Martin*, 34 Ark. 340; *People v. Page*, 3 Park. Crim. 600; *State v. Heitsch*, 29 Minn. 134, 12 N. W. Rep. 353.

¹⁰⁵ *State v. Heitsch*, 29 Minn. 134, 12 N. W. Rep. 353.

"fermented or distilled liquor" on Sunday, and another statute forbids any keeper of a dram-shop to sell any "intoxicating liquors" on Sunday, an indictment charging a person with selling "intoxicating liquors" on Sunday is bad, unless it also charges that he was the keeper of a dram-shop.¹⁰⁶ We find, however, an occasional decision that it is sufficient if the character or occupation of the defendant appears in evidence, or is otherwise satisfactorily established before rendition of judgment.¹⁰⁷ But this is not in harmony with the general principle which requires the indictment to show every fact necessary to constitute the offense. And in accordance with the same rule, if the statute imposes different penalties upon one class of persons from those imposed upon another class, for doing the same act, the indictment should indicate the class to which the defendant belongs. Such, for example, is the case where the law imposes a fine upon any person selling liquor to minors, but, if the vendor is a licensed dealer, imposes the additional penalty of forfeiture of his license.¹⁰⁸ But on the other hand, if the character or occupation of the defendant is not an essential ingredient of the offense,—if the statute prescribes a punishment for *all* persons alike who may do the prohibited act, irrespective of their calling or business,—it is not necessary that the indictment should contain any such allegation.¹⁰⁹ Thus, an indictment for selling liquor without a license need not charge that defendant was a liquor-dealer; for no one can sell without license, whatever his business may be.¹¹⁰ But if the defendant is described in the indictment as a "trader in goods, wares, and merchandise, and spirituous liquors," there is no room for objection on that ground.¹¹¹ And an indictment against two defendants jointly, for keeping open a saloon where intoxicating liquors were sold during the day of an election, is not defective because it fails to allege a part-

¹⁰⁶ State v. Lisles, 58 Mo. 359.

¹⁰⁷ Brown v. State, 2 Head. 180.

¹⁰⁸ Baer v. Comm., 10 Bush. 8.

¹⁰⁹ State v. Butcher, 40 Ark. 362; Johnson v. People, 83 Ill. 431; Comm. v. Rucker, 14 B. Mon. 228; Comm. v. Pearson, 3 Metc. (Mass.) 449; Comm. v.

Luddy, 143 Mass. 563, 10 N. E. Rep. 448; State v. Farmer, 104 N. Car. 887, 10 S. E. Rep. 563.

¹¹⁰ State v. Butcher, 40 Ark. 362.

¹¹¹ State v. Fant, 2 La. Ann. 837; State v. Bogan, Id. 838.

nership between the defendants, or that either of them owned or controlled the saloon.¹¹²

§ 454. Misnomer of Defendant.

It is a familiar rule of criminal pleading that a substantial mistake in the name of the defendant, as given in the indictment, is good ground for a plea in abatement; but a misnomer is waived by a plea of not guilty. This rule applies as well to prosecutions under the liquor laws as to any other criminal cases. Thus, in a case in Alabama, the defendant was indicted under the name of "Zachariah Lawrence," for selling liquor without a license. He pleaded in abatement that his name was "Zachary Taylor Lawrence." The plea was sustained.¹¹³ In Vermont, where an information for maintaining a liquor nuisance named the respondent as "Thomas J.," and he pleaded in abatement that his name was "Timothy J.," it was held that the information might be amended.¹¹⁴

§ 455. Allegations of Sales.

In a majority of the prosecutions instituted under the liquor laws, the gist of the offense is a sale of liquor, made under circumstances which render it unlawful. In such cases, the sale should be alleged in the indictment by the use of proper technical terms. There is, however, some authority for thinking that the term "sell" is not absolutely indispensable in this connection. In a case in Massachusetts, an indictment was held good which alleged that the defendant "did presume to be, and was, a retailer of spirituous liquors to" a person named. The court held that this language substantially charged a sale. "To retail," they said, "is to sell in small quantities. To retail to any particular individual is to sell to him in a small quantity."¹¹⁵ But the careful pleader will make use of the one word which precisely

¹¹² *Janks v. State*, (Tex. App.) 15 S. W. Rep. 815.

¹¹³ *Lawrence v. State*, 59 Ala. 61.

¹¹⁴ *State v. Murphy*, 55 Vt. 547.

¹¹⁵ *Comm. v. Kimball*, 7 Metc. (Mass.)

304. The omission of the auxiliary verb "did," which should have been joined with the words "sell and dispose of," is not fatal upon a motion in arrest. *State v. Whitney*, 15 Vt. 298.

describes the transaction. If this allegation is broader than the terms of the statute, the superabundant words may usually be disregarded, provided there is no essential repugnance. Thus, where the indictment charges that the defendant, without a license, "did unlawfully sell for one dime, barter for, and give away, certain intoxicating liquor," and the statute does not make it an offense to "give away" or "barter for" liquor, the indictment will be sustained against a motion to quash.¹¹⁶ And conversely, although the statute uses additional or cumulative terms, it does not follow that the indictment must employ them all. For instance, where the statute is directed against any one who shall "sell or be in any wise concerned in selling," it is enough if the indictment simply charges that the defendant "sold" liquors.¹¹⁷ So, under a statute providing that no unlicensed person shall "barter, sell, exchange, or otherwise dispose of, for his gain or benefit, any spirituous liquors," it is not necessary that the indictment should allege that the sale charged was made by the defendant "for his gain or benefit."¹¹⁸ Where the sale was made to one who acted as the agent of an undisclosed principal, it is held that it may be alleged as a sale to the agent, or it may be charged as a sale to the principal, if he is afterwards discovered.¹¹⁹ If the sale was made by an agent or servant of the defendant, the name of such person should be given, if it is intended to charge the act as a sale by the master or principal. But if the latter is indicted for being "interested in" an unlawful sale, it is not necessary to name the subordinate through whom the sale was made.¹²⁰ When the defendant is charged under a statute against selling liquor as a traveling agent for another person or firm, the indictment should name the person or firm for whom the accused acted as agent.¹²¹ Where the statute provides that a delivery of liquors in a non-license town shall

¹¹⁶ *Steel v. State*, 26 Ind. 92. See, also, *State v. Fant*, 2 La. Ann. 837; *State v. Finan*, 10 Iowa, 19; *State v. Woodward*, 25 Vt. 616.

¹¹⁷ *Needham v. State*, 19 Tex. 332.

¹¹⁸ *Anderson v. People*, 68 Ill. 53. See, also, *Arrington v. Comm.*, (Va.) 12 S. E. Rep. 324.

¹¹⁹ *Comm. v. Very*, 12 Gray, 124; *Comm. v. McGuire*, 11 Gray, 460; *State v. Wentworth*, 35 N. H. 442.

¹²⁰ *O'Bryan v. State*, 48 Ark. 43, 2 S. W. Rep. 339.

¹²¹ *State v. Higgins*, 53 Vt. 191.

be deemed a sale there, an indictment containing an ordinary charge of a sale in such town is sufficient.¹²²

§ 456. Alleging Evasions or Devices to Conceal a Sale.

We have already seen that any transaction which in reality amounts to a sale of liquor, in violation of law, will be punished as such, whatever devices or subterfuges the parties may resort to for the purpose of concealing the sale or evading the statute.¹²³ Where such cases are met by the terms of the law,—as, where the statute provides that “the giving away of intoxicating liquors, or other shift or device to evade the provisions of this act, shall be deemed and held to be an unlawful selling,”—the indictment may simply allege a “sale,” and under this, all the facts necessary to constitute a sale may be proved.¹²⁴ So, where an unlicensed person sells liquor with another article and receives pay for both together, it is sufficient to allege the sale of the liquor only.¹²⁵ And so, when the statute speaks of selling liquor directly or indirectly, or on any pretense or by any device, it only designs to describe different methods of committing the same offense; and it is not necessary that the indictment should state in what method the selling was accomplished.¹²⁶ But when the statute does not prohibit the giving away of liquors, unless done “with the purpose of evading the law,” it is thought that where the transaction charged as the *gravamen* of the offense pretended to be a gift, though it was really a sale, the indictment, to be sufficient, must charge that the gift was made “with the purpose of evading the law.”¹²⁷ And if the statute prohibits the giving away of liquor “in consideration of the purchase of other property,” the proper method is to charge a gift, adding the words of the statutory qualification.¹²⁸

¹²² *State v. Basserman*, 54 Conn. 88, 6 Atl. Rep. 185.

¹²³ *Supra*, § 405.

¹²⁴ *People v. Sweetser*, 1 Dak. 308, 46 N. W. Rep. 452.

¹²⁵ *Comm. v. Thayer*, 8 Metc. (Mass.) 525.

¹²⁶ *State v. Devine*, 4 Iowa, 448.

¹²⁷ *Stallworth v. State*, 16 Tex. App. 345. But a prohibited *sale* being a violation and not an evasion of the law, an indictment need not allege the sale to have been made with that purpose. *McMillan v. State*, 18 Tex. App. 375.

¹²⁸ *State v. Finan*, 10 Iowa, 19.

§ 457. Charging Use or Disposition of Liquors.

There are some cases in which it will be necessary for the indictment to show the purpose for which the liquors were sold, or the use or disposition intended to be made of them. For example, where, to constitute the offense which the indictment attempts to charge, the defendant, being a druggist, must have sold the liquor as a beverage, the indictment is fatally defective if it does not so charge.¹²⁹ And so an indictment for the sale of cider, under a statute which only prohibits its sale "as a beverage or for tippling purposes," must allege that it was sold for such purposes.¹³⁰ Sometimes the necessity of charging the purpose of the sale will be sufficiently met by a negative allegation, to the effect that the liquor was not sold for any of the specially excepted and permitted uses; as under a general prohibitory law, forbidding all sales except for medical, scientific, or mechanical purposes.¹³¹

§ 458. Knowledge and Intent of Vendor.

If it is an essential ingredient of the offense charged that the defendant should have known the special facts which made the sale unlawful, such knowledge should be alleged in the indictment. But in all cases where ignorance or mistake of fact would not constitute a defense, such an allegation is not needed. Thus, if the statute prohibiting the sale of liquor to minors does not provide that the act must be "knowingly and wilfully" done, to constitute the offense, it is not necessary that these words should appear in the indictment.¹³² Regard must be had to the statute. And if the indictment does not contain enough to make out the statutory misdemeanor, it will not be aided by the employment of the common law formulas. For instance, under a statute prohibiting the sale of intoxicating liquors

¹²⁹ State v. Buckner, 20 Mo. App. 420.
See, also, People v. Hinchman, 75 Mich.
587, 42 N. W. Rep. 1006.

¹³⁰ State v. Dunlap, 81 Me. 389, 17 Atl.
Rep. 313.

¹³¹ State v. Shackles, 29 Kans. 341.

¹³² Comm. v. Sellers, 130 Pa. St. 32, 18
Atl. Rep. 541.

"as a beverage," an indictment charging that defendant did sell intoxicating liquors "maliciously and wilfully" does not state an offense.¹³³

§ 459. Allegation as to Time.

An indictment for an unlawful sale of liquor should always contain an allegation of the *time* when the sale charged was made.¹³⁴ But the degree of particularity with which the date must be given will depend, in large measure, upon whether the indictment is drawn under common-law rules or under statutes dispensing with a precise statement of time where time is not of the essence of the offense. Under the former system, a complaint which does not state the year in which the alleged sale was made is fatally defective.¹³⁵ And it must also specify the particular day; and if the day of the month is left blank, although the month and the year may be named, it is not sufficient.¹³⁶ As to the sufficiency of a charge that the offense was committed "on or about" a certain specified day, the authorities are not harmonious. In some jurisdictions, such an allegation is held good at common law; in others, it is considered insufficient; in others, it passes muster by the aid of a statute.¹³⁷ It is usual and proper to repeat allegations of time and place, before material averments in the same count, by the use of the phrase "then and there." But it is said that a count alleging that the defendant did "then and

¹³³ *State v. Hafsoos*, (S. Dak.) 47 N. W. Rep. 400.

¹³⁴ *Comm. v. Adams*, 1 Gray, 481; *Comm. v. Kingman*, 14 Gray, 85; *Comm. v. Thurlow*, 24 Pick. 374; *State v. Kennedy*, 36 Vt. 563; *State v. O'Keefe*, 41 Vt. 691; *State v. Bruce*, 26 W. Va. 153; *Clark v. State*, 34 Ind. 436; *State v. Zeitler*, 63 Ind. 441. See *Olmstead v. State*, (Ala.) 9 South. Rep. 737; *Phillips v. State*, (Ga.) 12 S. E. Rep. 650.

¹³⁵ *State v. Kennedy*, 36 Vt. 563. An allegation in an indictment that the offense therein charged was committed on a certain specified "day of September now past," is not stated with suffi-

cient certainty. *Comm. v. Griffin*, 3 Cush. 523.

¹³⁶ *Clark v. State*, 34 Ind. 436. Compare *Savage v. Comm.*, 84 Va. 582, 5 S. E. Rep. 563.

¹³⁷ See *State v. O'Keefe*, 41 Vt. 691; *Rawson v. State*, 19 Conn. 292; *Comm. v. Purdy*, 147 Mass. 29; *State v. Lavake*, 26 Minn. 526, 6 N. W. Rep. 339, 37 Am. Rep. 415. See, also, *State v. McMickle*, 34 Tex. 676; *State v. Elliott*, Id. 143; *People v. Aro*, 6 Cal. 207, 65 Am. Dec. 503; *Farrell v. State*, 45 Ind. 371; *Cokely v. State*, 4 Iowa, 477; *State v. Harp*, 31 Kans. 496, 3 Pac. Rep. 432; *State v. Tuller*, 34 Conn. 280; *Fish v. Manning*, 31 Fed. Rep. 340.

there" unlawfully sell liquor, no other reference to time being made in that count, although a definite time was fixed in the preceding count, is demurrable.¹³⁸ If the allegation of time undertakes more than is necessary, (as, specifying a day of the week, when that does not enter into the offense,) the surplus matter may be rejected; it is no ground for dismissing the complaint or quashing the indictment.¹³⁹ So a complaint for not closing a saloon at nine o'clock is not bad because nine o'clock of the evening is not specified.¹⁴⁰ And a complaint which charges the defendant with having been engaged in an illegal occupation from a specified day "unto the day of the date hereof," the complaint being fully dated as to day, month, and year, sufficiently alleges the time of the offense.¹⁴¹

In several of the states, as we have already intimated, the statutes provide that an indictment shall not be rendered invalid for stating imperfectly the time at which the offense was committed, where time is not of the essence of the offense. Under such a provision, a general allegation as to the time of the sale charged is sufficient.¹⁴² And it is not invalidated by the fact that the day of the month is not given, if the year and month are stated.¹⁴³ And it has been held sufficiently certain to allege that the sale was made "on or about the months of January, February, and March."¹⁴⁴ It is also ruled that time is not a material ingredient of the offense of keeping a saloon wherein intoxicating liquors were sold, and under an indictment charging sales on a specified day, a conviction may be had for sales made at any time within three years prior to the finding of the indictment.¹⁴⁵ An averment that the defendant sold liquor "on the 6th, 7th, 8th, and 9th days of June, and for thirty days previous to said 6th of June, and on each and every of said days," has been held sufficient to warrant the proof of any sales within that period.¹⁴⁶

¹³⁸ State v. Bruce, 26 W. Va. 153.

¹³⁹ State v. Fletcher, 13 R. I. 522.

¹⁴⁰ People v. Husted, 52 Mich. 624, 18 N. W. Rep. 388.

¹⁴¹ Comm. v. Hagarman, 10 Allen, 401.

¹⁴² Arrington v. Comm., (Va.) 12 S. E. Rep. 224.

¹⁴³ Savage v. Comm., 84 Va. 582, 5 S. E. Rep. 563.

¹⁴⁴ State v. Findley, 77 Mo. 338.

¹⁴⁵ State v. Wambold, 72 Iowa, 468, 34 N. W. Rep. 213.

¹⁴⁶ Mayor of New York v. Mason, 4 E. D. Smith, 142. Compare Comm. v. Adams, 1 Gray, 481; Comm. v. Traverse, 11 Allen, 260.

§ 460. Laying the Time with a Continuando.

When the offense charged is continuous, consisting of a succession of acts, or a prohibited traffic carried on from day to day, it may properly be laid with a *continuando*.¹⁴⁷ And where an offense of this kind is charged to have been committed on a certain specified day and "on divers other days and times between" such day and the day of finding the indictment, the allegation is good, although the date specified may have been beyond the period of limitations.¹⁴⁸ But this form of allegation is not strictly proper where the offense charged is not continuous in its nature, but consists of a single act. Nevertheless, if the date specified is within the time of limitations and is laid with sufficient certainty, the clause in relation to "divers other days and times" may be rejected as surplusage, and so the indictment will be sustained.¹⁴⁹

§ 461. Allegation as to Place.

An indictment for an unlawful sale of liquor should always contain an allegation of the *place* where the sale charged was made.¹⁵⁰ And in some states it is held that an allegation which does not charge the offense to have been committed in any other place than the county is not good.¹⁵¹ But it need not designate the place of sale with any greater accuracy than by naming a particular town or city in the appropriate county.¹⁵² Thus, an indictment which describes the defendant as "J. S. of N., in the county of W.," and alleges that he

¹⁴⁷ Our House v. State, 4 Greene, (Iowa), 172.

¹⁴⁸ State v. Cofren, 48 Me. 364.

¹⁴⁹ Dansey v. State, 23 Fla. 316, 2 South. Rep. 692; Comm. v. Bryden, 9 Metc. (Mass.) 137; Comm. v. Walton, 11 Allen, 238; Comm. v. Kendall, 12 Cush. 414; Comm. v. Rhodes, 148 Mass. 123, 19 N. E. Rep. 22; South v. Comm., 79 Ky. 493; People v. Gilkinson, 4 Park. Crim. 26.

¹⁵⁰ Young v. Comm., 14 Bush, 161; Grimme v. Comm., 5 B. Mon. 263;

State v. Peterson, 38 Minn. 143, 36 N. W. Rep. 443; Loughridge v. State, (Miss.) 3 South. Rep. 667; Comm. v. Head, 11 Gratt. 819; Arrington v. Comm., (Va.) 12 S. E. Rep. 224. Compare State v. Cottrill, 31 W. Va. 162, 6 S. E. Rep. 428.

¹⁵¹ Grimme v. Comm., 5 B. Mon. 263. Compare State v. Emery, 98 N. Car. 668, 3 S. E. Rep. 636.

¹⁵² Zumhoff v. State, 4 Greene, (Iowa), 526; Savage v. Comm., 84 Va. 619, 5 S. E. Rep. 565.

sold liquor unlawfully "at N.," though without saying "said N." or adding the name of the county, sufficiently states the place of the commission of the offense.¹⁵³ But a complaint which merely charges an unlawful sale of liquor "at W.," without saying "at the town of W.," and without giving the name of the county, is fatally defective.¹⁵⁴ Further than specifying the county and town it is not generally necessary to go. Thus, the indictment need not state whether the sale was made from a dwelling-house, or from a tavern, or other place of common resort, although the statute may prescribe different rules as to the evidence required in the two cases.¹⁵⁵ The exception to this rule, however, is found in cases where the acts complained of are such as, under the local statute, would constitute the particular place where they were done a nuisance. Here the place must be described with sufficient accuracy to identify it. Under this requirement, it is held that an allegation that the offense was committed "at O., in the county of R., in a stone building used and occupied by the defendant as a grocery and a dwelling-house at the time of the sale," is a sufficient description of the place.¹⁵⁶ And so is an allegation describing the place as a certain one-story frame building, in a designated city, known as West's drug-store.¹⁵⁷ But it is held that an indictment charging that the defendant "on or about the eighteenth day of November, A. D. 1865, a certain frame building . . . did sell intoxicating liquors," is bad on motion to quash, by reason of the omission of the word "in" before the words "a certain frame building." In making this decision, the court said that the place of the alleged offense must be so described in the indictment as that an officer executing process would be able to identify it, one reason being that, under the statute, all places where intoxicating liquors were sold in violation of law might be shut up and abated as nuisances.¹⁵⁸

¹⁵³ *Comm. v. Cummings*, 6 Gray. 487.

¹⁵⁴ *Comm. v. Barnard*, 6 Gray, 488.

¹⁵⁵ *Comm. v. Clapp*, 5 Gray, 97. See *Burch v. Republic*, 1 Tex. 608; *Cochran v. State*, 26 Tex. 678.

¹⁵⁶ *State v. Muntz*, 3 Kans. 383.

¹⁵⁷ *West v. Columbus*, 20 Kans. 638.

¹⁵⁸ *Hagan v. State*, 4 Kans. 89.

§ 462. Laying the Venue.

The caption or introduction of an indictment should definitely name the county and state. And when this is done, the name of the state need not be repeated in the counts, and the county may thereafter be referred to as "said county of A.," or as "the county aforesaid." Thus, for example, if the indictment begins with the words "The jurors of the grand jury of the county of Riley and state of Kansas empanelled," an allegation, in the body of the indictment, that the offense was committed "at Ogden, in the county of Riley aforesaid" is a sufficient laying of the venue.¹⁵⁹ So also, where the indictment is entitled "The district court for the counties of Lyon and Lincoln, and state of Minnesota," the place of the commission of the offense is sufficiently described by an allegation that it was done "in said county of Lincoln."¹⁶⁰ But it will be observed that in a case like the last, where two counties are named in the caption or introduction, it would not be sufficient to refer to "the county aforesaid," because it would be ambiguous.

§ 463. Where Place is of the Essence of the Offense.

There are some cases in which the place of its commission is so far a material element of an offense as to require to be stated with great particularity. Thus, under a statute prohibiting the sale of malt liquors "at or within three miles of Providence College," an indictment charging that defendant sold such liquors "at Nettleton, in violation of an act of the legislature," (referring to the said statute by date and title,) but not alleging that the sale was made within three miles of Providence College, was held fatally defective.¹⁶¹ So, where the law appropriates all moneys accruing from fines for violations of the liquor laws committed within the limits of a city to the use of the city, and makes a different disposition of the fines where

¹⁵⁹ State v. Muntz, 3 Kans. 383; State v. Shaw, 35 N. H. 217.

¹⁶⁰ State v. Lavake, 26 Minn. 526, 6 N. W. Rep. 339, 37 Am. Rep. 415.

¹⁶¹ Ragan v. State, 67 Miss. 332, 7 South. Rep. 280.

the offenses were committed beyond the city limits, the exact place of an offense charged becomes material and must be proved as laid.¹⁶² So, an indictment under the local option law should specify the precinct where the liquor was sold.¹⁶³

§ 464. Allegation of Name of Purchaser.

In an indictment for an unlawful sale of intoxicating liquors, is it necessary to allege the name of the person to whom the sale was made? Upon this question the authorities are so entirely divided that neither side can be said to be supported by a general current of judicial opinion. In the first place, there are many respectable decisions to the effect that the name of the vendee, if known, must be stated in the indictment, and if it is not known to the prosecutor or the grand jury, that fact must be stated as an excuse.¹⁶⁴ These rulings proceed upon the ground that, without such an allegation, the indictment would not possess the requisite degree of certainty. Says the supreme court of Minnesota: "An offense charged should be described with certainty sufficient to inform the defendant of the particular thing with which he is charged. Otherwise he cannot know how to prepare his defense. Such certainty is also requisite that he may conveniently avail himself of an acquittal or conviction, in bar of a subsequent prosecution for the same matter."¹⁶⁵ So in Texas it is asked: "How is he to know what particular sale he is to answer for, unless the indictment in some way identifies the sale complained of by the state as a violation of law? Must he come prepared to prove the legality of each of the thousand sales he has

¹⁶² Legori v. State, 8 Sm. & Mar. 697.

¹⁶³ Young v. Comm., 14 Bush, 161.

¹⁶⁴ Comm. v. Dean, 21 Pick. 334; State v. Doyle, 11 R. I. 574; State v. Walker, 3 Harr. (Del.) 547; Roberson v. Lambertville, 38 N. J. Law, 69; State v. Plainfield, 44 N. J. Law, 118; Capritz v. State, 1 Md. 569; State v. Faucett, 4 Dev. & B. L. 107; State v. Starney, 71 N. Car. 202; State v. Schroder, 3 Hill, (S. Car.) 61; State v. Steedman, 8 Rich. Law, 312; Dorman v. State, 34 Ala. 216;

Dixon v. State, 21 Tex. App. 517, 1 S. W. Rep. 448; State v. Stuckey, 2 Blackf. 289; Blodget v. State, 3 Ind. 403; State v. Burgess, 4 Ind. 606; McLaughlin v. State, 45 Ind. 338; State v. Allen, 32 Iowa, 491; Wilson v. Comm., 14 Bush, 159; State v. Pischel, 16 Nebr. 608, 21 N. W. Rep. 468; Martin v. State, (Nebr.) 46 N. W. Rep. 618; State v. Schmail, 25 Minn. 368.

¹⁶⁵ State v. Schmail, 25 Minn. 368.

made? To require this would be unreasonable and oppressive. It is not unreasonable to devolve upon the state the not difficult duty of informing the accused which one of the sales made by him is complained of as unlawful."¹⁶⁶ "The statute makes each act of selling a crime. It is proper that the act be so described as to identify it from other acts of a similar kind as near as practicable. And this can be best done by giving the name of the vendee if known, or if unknown, so alleged."¹⁶⁷ To this view also inclines the federal circuit court in Oregon, although it holds that the omission to name the purchaser is not sufficient cause for the reversal of the judgment on error.¹⁶⁸

On the other hand, a great number of authorities sustain the doctrine that it is *not* necessary for the indictment either to name the purchaser or to allege that he is unknown, or to make any reference to him further than that implied in the allegation that a sale was made.¹⁶⁹ In this connection, we quote from a decision in Louisiana

¹⁶⁶ *Dixon v. State*, 21 Tex. App. 517, 1 S. W. Rep. 448.

¹⁶⁷ *State v. Pischel*, 16 Nebr. 608, 21 N. W. Rep. 468.

¹⁶⁸ *Nelson v. United States*, 30 Fed. Rep. 112. Said Judge Deady: "I do not think this omission is a matter that can be alleged here as error. The name can only be required for the more convenient identification of the transaction. It is not a necessary ingredient of the offense, particularly where the prohibition to sell is general, irrespective of persons. If it was a case of prohibition to sell to a particular person or class of persons, as a woman or minors, there would be more reason for holding that the name of the person to whom the sale was made is a necessary part of the statement of the offense."

¹⁶⁹ *United States v. Gordon*, 1 Cranch C. C. 58; *People v. Adams*, 17 Wend. 475; *State v. Munger*, 15 Vt. 290; *Comm. v. Schoenhutt*, 3 Phila. 20; *Comm. v. Baird*, 4 Serg. & R. 141; *State v. Bailey*, 43 Ark. 150; *Johnson v. State*, 40 Ark.

453; *State v. Parnell*, 16 Ark. 506, 63 Am. Dec. 72; *McCuen v. State*, 19 Ark. 630; *Cochran v. State*, 26 Tex. 678; *State v. Heldt*, 41 Tex. 220; *Hill v. Dalton*, 72 Ga. 314; *Lea v. State*, 64 Miss. 201, 1 South. Rep. 51; *Riley v. State*, 43 Miss. 397; *Dansey v. State*, 23 Fla. 316, 2 South. Rep. 692; *Jordan v. State*, 22 Fla. 528; *State v. Kuhn*, 24 La. Ann. 474; *State v. Brown*, 41 La. Ann. 771, 6 South. Rep. 638; *State v. Hickerson*, 3 Heisk. 375; *State v. Staley*, 3 Lea, 565; *Hulstead v. Comm.*, 5 Leigh, (Va.) 724; *State v. Ferrell*, 30 W. Va. 683, 5 S. E. Rep. 155; *State v. Pendergast*, 20 W. Va. 672; *Rice v. People*, 33 Ill. 435; *Cannaday v. People*, 17 Ill. 158; *State v. Becker*, 20 Iowa, 438; *State v. Brooks*, 33 Kans. 708, 7 Pac. Rep. 191; *Junction City v. Webb*, 44 Kans. 71, 23 Pac. Rep. 1073; *State v. Ladd*, 15 Mo. 430; *State v. Spain*, 29 Mo. 415, (overruling *Neale v. State*, 10 Mo. 430); *State v. Rogers*, 39 Mo. 431; *State v. Fanning*, 38 Mo. 359; *State v. Jaques*, 68 Mo. 260; *State v. Houts*, 36 Mo. App. 265; *State v. Bielby*, 21 Wis. 204; *State v. Gummer*.

as follows: "The point made on the third ground of the motion is that, in default of an averment giving the name of the buyer of the spirituous liquors, the accused is unable to make his defense, and would be deprived of the means of meeting a second charge for the same offense. As the *gravamen* of the misdemeanor is the selling of liquor without a license, the person of the party purchasing is not an essential ingredient of the charge. The statute makes no discrimination of grade or degree of the offense, based on the age, sex, or personality in any way of the persons to whom the liquors are sold. Hence the name of the buyer is a matter of no essential importance in the confection of the indictment. It contains a special averment of the date of the offense charged, and that is sufficient to guard the accused against a second prosecution for the same offense."¹⁷⁰ It is also remarked by the court in Wisconsin: "The offense complained of works no injury upon the individual rights of the person to whom the sale was made, and none are supposed to be violated; and hence the designation of such person by name is in no way material to constitute the offense."¹⁷¹ In Kansas, the statute expressly and specifically provides that the name of the purchaser of the liquor need not be stated in the indictment. There is nothing unconstitutional in this legislation.¹⁷²

It will be perceived that nearly all the foregoing authorities point to, or imply, a rule that if the *gravamen* of the offense charged is a sale made to a person belonging to a protected or prohibited class, as a minor, an intoxicated person, or an habitual drunkard, the requirement of certainty will oblige the pleader to state the name of the vendee, if it is known. This rule is of unquestionable propriety and justice, and is also supported by some authorities directly.¹⁷³ But on the other hand, if the particular sale alleged is not the essence of the offense, but only an instance or evidence of it, the name of the purchaser is clearly not material. Thus the offense may be "pursuing the business" of liquor-selling without a license.

22 Wis. 441; *People v. Sweetser*, 1 Dak. 308, 46 N. W. Rep. 452; 2 Wharton, Crim. Law, § 2445.

¹⁷⁰ *State v. Brown*, 41 La. Ann. 771, 6 South. Rep. 638.

¹⁷¹ *State v. Bielby*, 21 Wis. 204.

¹⁷² *State v. Whisner*, 35 Kans. 271, 10 Pac. Rep. 852; *State v. Schweiter*, 27 Kans. 499.

¹⁷³ *Myers v. People*, 67 Ill. 503.

Here each act of selling is not a distinct offense, although it is necessary to *prove* one or more sales, and therefore, even if a particular sale is alleged in the indictment, it is in no way necessary to state the name of the person to whom that particular sale was made.¹⁷⁴ For cases falling between these two extremes, there is, as we have stated, no generally accepted rule, and the careful pleader will conform to the precedents in his own state.

§ 465. How Purchaser is Described.

Supposing it to be necessary, according to the rule prevailing in the particular state, to name the person to whom the liquor was sold, in the indictment, or that the pleader at any rate undertakes to do so, we shall find that the ordinary rules of criminal pleading will be applicable. Thus, the purchaser may be described by the name by which he is commonly and usually known, although it may differ from his baptismal name; and where he is known by two or more names, he may be described by one or all of them.¹⁷⁵ But as the allegations and proofs must correspond, an indictment for unlawfully selling to A. will not authorize proof of selling to B.¹⁷⁶ If the name of the purchaser has not been discovered, he may be described as "a person to the jurors unknown."¹⁷⁷ But what would be the effect, upon an indictment so framed, of the fact that the purchaser's name was really known to the grand jury, or could have been ascertained by them upon inquiry, is a question upon which the authorities are not entirely clear. Probably it must depend upon whether, in the particular jurisdiction, the name of the vendee is considered an indispensable part of the indictment. It has been ruled that, in a case such as that supposed, the indictment should not be sustained.¹⁷⁸ But in another state, it is said that the knowledge of the grand jurors of the name of such person, is of no importance, where the case has proceeded to trial without preliminary objection.¹⁷⁹ An indictment

¹⁷⁴ *Mansfield v. State*, 17 Tex. App. 468; *State v. Muse*, 4 Dev. & B. 319.

¹⁷⁵ *Henry v. State*, 113 Ind. 304, 15 N. E. Rep. 593.

¹⁷⁶ *Comm. v. Taggart*, 8 Gratt. 697.

¹⁷⁷ *State v. Carter*, 7 Humph. 158; *Comm. v. Hitchings*, 5 Gray, 482.

¹⁷⁸ *Blodget v. State*, 3 Ind. 403.

¹⁷⁹ *People v. Bradley*, (Sup.) 11 N. Y. Supp. 594.

for selling liquor without a license may charge the sale to two persons, in the same count.¹⁸⁰

§ 466. Description of Liquors Sold.

In an indictment for an unlawful sale of liquor, in the description of the article sold, it will generally be sufficient to follow the language of the statute on which the prosecution is founded.¹⁸¹ The fact that the indictment in its caption charges the defendant with being interested in the sale of liquor, while the charging part avers that he was interested in the sale of a compound of ardent liquors, is an immaterial variance, where the body of the count distinctly states the particular offense.¹⁸² And if, after the use of a general term, as "spirituous," there follows a specification of a particular kind of liquor, laid under a *videlicet*, this will not restrict the prosecution to proof of a sale of the particular liquor so named.¹⁸³ But the liquor proved to have been sold must come within the general terms used in the indictment. If, for instance, the defendant is charged with having sold "spirituous, vinous, or malt liquors," it must be shown that he sold one or more of the kinds of liquor mentioned, and proof that the article sold was intoxicating is not sufficient without further proof that it was either spirituous, vinous, or malt.¹⁸⁴ Where the statute provides that the word "intoxicating," as used therein, shall include all liquors containing more than a certain proportion of alcohol, a complaint charging the unlawful keeping of "strong and malt and intoxicating liquors" is not defective for failure to inform the defendant as to whether he is accused of keeping unlawfully liquors in fact intoxicating, or those deemed by law to be intoxicating.¹⁸⁵ The mere clerical omission of the word "liquor," after "intoxicating," in the allegation that defendant was not licensed, will not viti-

¹⁸⁰ Peer's Case, 5 Gratt. 674.

¹⁸¹ See Comm. v. Morgan, 149 Mass. 314, 21 N. E. Rep. 369; State v. Spaulding, 61 Vt. 505, 17 Atl. Rep. 844. An indictment for unlawfully selling spirituous liquors by retail is not bad for using the word "spiritual" instead of "spirituous." State v. Clark, 3 Ind. 451.

¹⁸² Williams v. State, 47 Ark. 230, 1 S. W. Rep. 149.

¹⁸³ Brugier v. United States, 1 Dak. 5, 46 N. W. Rep. 502.

¹⁸⁴ Brantly v. State, (Ala.) 8 South. Rep. 816.

¹⁸⁵ State v. McKenna, 16 R. I. 398, 17 Atl. Rep. 51.

ate the indictment where the allegation of the sale uses the full expression.¹⁸⁶

§ 467. Not Necessary to Specify Particular Kind of Liquor.

It is a well settled and accepted rule that an indictment for the unlawful sale or keeping of liquors need not specify the particular *kind* of liquor which it is expected to prove at the trial. That is, if the indictment charges the sale of "spirituous" or "intoxicating" liquor, or uses any other general term employed in the statute, it will be sufficient without an additional allegation that the liquor was whisky, rum, gin, wine, beer, etc.¹⁸⁷ The class or species of the liquor sold is not a material ingredient of the offense, and the defendant is not entitled to more detailed information on this point, if the other allegations of the indictment describe the particular transaction with sufficient certainty to identify it. And in some states, where the statutes prohibit the unlicensed sale of "spirituous, vinous, or malt liquors," it is held that the particular kind of liquor alleged to have been sold, whether spirituous, vinous, or malt, need not be named in the indictment by either of those terms; it is sufficient to allege that the defendant sold "intoxicating liquor."¹⁸⁸ And further,

¹⁸⁶ *Walter v. State*, 105 Ind. 589, 5 N. E. Rep. 735.

¹⁸⁷ *United States v. Gordon*, 1 Cranch C. C. 58; *State v. Dorr*, 82 Me. 341, 19 Atl. Rep. 861; *State v. Blaisdell*, 33 N. H. 388; *State v. Reynolds*, 47 Vt. 297; *Comm. v. Conant*, 6 Gray, 482; *Comm. v. Timothy*, 8 Gray, 480; *Comm. v. Ryan*, 9 Gray, 137; *Comm. v. Clark*, 14 Gray, 367; *State v. Teahan*, 50 Conn. 92; *Savage v. Comm.*, 84 Va. 582, 5 S. E. Rep. 563; *State v. Packer*, 80 N. Car. 439; *Dansey v. State*, 23 Fla. 316, 2 South. Rep. 692; *Powell v. State*, 69 Ala. 10; *Boon v. State*, Id. 226; *Cochran v. State*, 26 Tex. 678; *State v. Sterns*, 28 Kans. 154; *State v. Brooks*, 33 Kans. 708, 7 Pac. Rep. 191; *State v. Whisner*, 35 Kans. 271, 10 Pac. Rep. 852; *State v.*

Witt, 39 Ark. 216; *State v. Graeter*, 6 Blackf. 105; *State v. Mullinix*, Id. 554; *Simpson v. State*, 17 Ind. 444; *Downey v. State*, 20 Ind. 37; *Fetterer v. State*, 18 Ind. 388; *Leary v. State*, 39 Ind. 360; *Connell v. State*, 46 Ind. 446; *State v. Hannum*, 53 Ind. 335; *Hooper v. State*, 56 Ind. 153; *State v. Whalen*, 54 Iowa, 753, 6 N. W. Rep. 552; *Foreman v. Hunter*, 59 Iowa, 550, 13 N. W. Rep. 659; *State v. Rogers*, 39 Mo. 431; *Frisbie v. State*, 1 Oreg. 248; *People v. Sweetser*, 1 Dak. 308, 46 N. W. Rep. 452. Compare *State v. Pischel*, 16 Nebr. 490, 21 N. W. Rep. 468; *State v. Fox*, 16 N. J. Law, 152.

¹⁸⁸ *Callahan v. State*, (Ind. App.) 28 N. E. Rep. 717, citing *State v. Hannum*, 53 Ind. 335; *Hooper v. State*, 56 Ind. 153;

if, in the allegation of sale, after the use of a general term, such as "spirituous" or "intoxicating" liquor, there follows a specification of a particular kind of liquor, laid under a *videlicet*, this will not restrict the prosecution to proof of a sale of the particular liquor so specified. Thus, under an indictment for unlawfully selling "spirituous liquors, to wit, one pint of whisky," a conviction may be had on proof of a sale of any kind of spirituous liquor.¹⁸⁹

§ 468. Charging Sale of Various Liquors in the Disjunctive.

It is not error to charge an offense consisting of an unlawful sale of liquors in the disjunctive, instead of the conjunctive, by using the word "or" instead of "and," in describing the various kinds of liquors alleged in the indictment to have been so sold.¹⁹⁰ An allegation so framed is not open to a charge either of duplicity or uncertainty. In some cases, the second term employed, following the particle "or," may be taken as explanatory of the preceding term, as if the word

Coverdale v. State, 60 Ind. 307; Garst v. State, 68 Ind. 101; Plunkett v. State, 69 Ind. 68; Wills v. State, Id. 286.

¹⁸⁹ Brugier v. United States, 1 Dak. 5, 46 N. W. Rep. 502. In this case the court observed: "A *videlicet* will not avoid a variance, or dispense with exact proof in an allegation of material matter. The allegations of time, place, quantity, quality, kind, and value, when not descriptive of the identity of the subject of the action, will be found immaterial, and may not be proved strictly as alleged. It is sufficient if the proof agree with the allegation in its substance and general character without precise conformity in every particular. An indictment describing a thing by its generic term is supported by proof of a species which is clearly comprehended within such description. Thus if the charge be of poisoning by a certain drug, and the proof be of poisoning by another drug, it is sufficient; or if the charge be of a felonious assault with a

staff, and the proof be of such an assault with a stone. 1 Greenl. Ev. (6th Ed.) 80-97, and notes, are authorities sufficient upon this point, and are, generally, all in favor of this position herein laid down. In cases where there are two words or phrases, as in this case,— 'spirituous liquor' and 'whisky,'—the broader includes the latter. The statute does not use the word 'whisky,'—but whisky is spirituous liquor. Proof, then, of the giving or selling of 'spirituous liquor,' the word being controlled by a *videlicet*, whatever the allegation in the indictment might be,—whether rum, gin, brandy, or whisky, or any other thing which is spirituous liquor,—should be regarded as competent to sustain such charge in the indictment. 1 Whart. Crim. Law, 622, and cases there cited."

¹⁹⁰ Cunningham v. State, 5 W. Va. 508; Barth v. State, 18 Conn. 432; Osgood v. People, 39 N. Y. 449; Morgan v. Comm., 7 Gratt. 592.

"or" had the force of "to wit." Thus, where a complaint charges the sale of "intoxicating or malt liquors," the word "malt" may be understood as a more specific designation of the kind of intoxicating liquors intended.¹⁹¹

§ 469. Allegation of Intoxicating Properties of Liquor.

We have just seen that the pleader may allege, in general terms, an unlawful sale of "intoxicating liquor," or "spirituous liquor," or otherwise, according to the language of the statute. If he prefers, instead of this, to name the particular kind of liquor sold, he must add an allegation that the same was spirituous liquor, or intoxicating liquor, unless the article named is a liquor of the intoxicating properties of which the courts will take judicial notice.¹⁹² An indictment, for instance, which charges a sale of "whisky" without alleging that the whisky sold was "intoxicating liquor," the words used in the statute, is sufficient; for the courts know officially that whisky is intoxicating.¹⁹³ But an indictment charging the selling of "liquor," without any averment that it was intoxicating, will be quashed.¹⁹⁴ If the particular article stated in the indictment is referred to by name in the statute, it is of course not necessary to add such an allegation; for if it is prohibited by the statute, it is immaterial what its properties may be. Thus, if the statute expressly forbids the sale of beer, an indictment need not allege it to be intoxicating.¹⁹⁵ If the article sold belongs to the doubtful class, of which the courts are not willing to take official notice in respect to their properties, and if it is not named in the statute, the best method is to lay it under a *videlicet*; as, for example, "intoxicating liquor, to wit, beer." Here, although beer in general may be of a kind intoxicating or not, so that the word does not necessarily mean beer that is intoxicating, yet the term "intoxicating liquor" controls.¹⁹⁶ Liquors which are not actually

¹⁹¹ State v. Boncher, 59 Wis. 477, 18 N. W. Rep. 335; State v. Nerbovig, 33 Minn. 480, 24 N. W. Rep. 321.

¹⁹² Butler v. State, 25 Fla. 347, 6 South. Rep. 67.

¹⁹³ State v. Jones, (Ind. App.) 29 N. E. Rep. 274; *supra*, § 12.

¹⁹⁴ Ward v. State, 48 Ind. 293.

¹⁹⁵ State v. Thornton, 63 N. H. 114; State v. Jenkins, 64 N. H. 375, 10 Atl. Rep. 699.

¹⁹⁶ State v. Brown, 51 Conn. 1.

intoxicating, but which the statute declares "shall be considered intoxicating within the meaning of this act," may be described as "intoxicating" in an indictment on that statute.¹⁹⁷

§ 470. Allegation as to Quantity Sold.

As a general rule, an indictment for an unlawful sale of intoxicating liquors should contain an allegation setting forth the quantity of liquor sold.¹⁹⁸ This is invariably necessary, as we shall presently see, when the prosecution is upon a statute which prohibits the selling, by certain persons or under certain circumstances, in quantities "less than" a certain measure. On the other hand, there are some offenses against the liquor laws where the quantity sold is not at all material; and here, as will be shown in a later section, the quantity need not be stated. Subject to this exception, however, the general rule requires the insertion of such an allegation in the indictment. In Virginia, a charge of selling ardent spirits to be drunk where sold, without license, must contain the words "by retail."¹⁹⁹ And in Arkansas, an indictment for keeping an unlicensed saloon, which does not show whether the defendant is charged with selling by the quart or in larger quantities, is fatally uncertain, because the penalties prescribed are different.²⁰⁰ But it has been held that an allegation, in an indictment for unlicensed selling, that the precise quantity of liquor sold is unknown, is sufficiently certain.²⁰¹ In one state, we find a decision to the effect that, upon an indictment for retailing ardent spirits, specifying the precise quantity and the kind, to be drunk where sold, without license, proof of retailing any quantity of any kind of ardent spirits, to be drunk where sold, is sufficient.²⁰²

¹⁹⁷ *Comm. v. Timothy*, 8 Gray, 480.

¹⁹⁸ *Manville v. State*, 58 Ind. 63; *Blasdel v. Hewit*, 3 Caines, 137. Compare *Comm. v. Conant*, 6 Gray, 482.

¹⁹⁹ *Boyle v. Comm.*, 14 Gratt. 674.

²⁰⁰ *State v. Clayton*, 32 Ark. 185.

²⁰¹ *Kilbourn v. State*, 9 Conn. 560.

²⁰² *Brock v. Comm.*, 6 Leigh, 634.

§ 471. Charging Sale of One "Glass" or "Drink."

When the quantity of liquor sold by the defendant is to be specified in an indictment, it should always be given according to the established and recognized measures; as, a quart, a pint, a gill. The use of a term not employed in the arithmetical tables of measures is always a dangerous experiment. For although the courts may sometimes recognize such a term as importing a definite and known quantity, it is never certain that they will do so. For instance, it is held that "one drink" does not signify any given quantity.²⁰³ But in a case in Maine, an indictment was sustained which charged the selling of "one glass" of spirituous liquor. The court said: "What is meant by a glass of spirits cannot be very unintelligible to dealers in that article, and our statute of *jeofails* requires only that the averments should be such as that the accusation should be intelligible."²⁰⁴ And so in New Hampshire, an indictment charging the illegal sale of "two glasses" of intoxicating liquor was considered sufficiently definite and certain, the court observing that whether a glass was understood to mean precisely half a gill, or the quantity usually contained in a drinking-glass as a single draught, it was intelligible enough as a description of quantity.²⁰⁵ But it must be observed that, in this last case, the statute prohibited the sale of any, the least quantity, of liquor without due authority. So that the averment of quantity was not material, further than as showing that *some* liquor was sold. And in Indiana, it is held that an indictment for the sale of liquor in a less quantity than a quart must set forth the quantity sold with greater accuracy than by the description of "two glasses."²⁰⁶

²⁰³ Cool v. State, 16 Ind. 355.

²⁰⁴ New Gloucester v. Bridgham, 28 Me. 60. For other decisions to the

same effect, see State v. Reed, 35 Me. 489; Wrocklege v. State, 1 Iowa, 167.

²⁰⁵ State v. Rust, 35 N. H. 438.

²⁰⁶ Haver v. State, 17 Ind. 455.

§ 472. Where Statute Prohibits Sales of "Less than" a Certain Quantity.

In many of the states, the statutes are so framed as to prohibit the sale of liquor, by certain persons or under certain conditions, in quantities less than a prescribed statutory minimum. Where an indictment is based on such a law, it must show on its face that the quantity sold by the defendant was such as to bring the sale within the terms of the act.²⁰⁷ There is not the least question as to the general rule, stated in these broad terms. But the moment we inquire into the sufficiency of various forms of allegations, intended to show the quantity sold, we find ourselves in a region of vexed questions and conflicting authorities. In the first place, some of the cases hold that if the sale is charged as "in a less quantity than a quart," (or otherwise according to the statute,) that will be sufficient, without adding a specification of a precise quantity.²⁰⁸ But other decisions require the statement of some particular quantity, which shall be known as a measure less than the statutory minimum.²⁰⁹ In the next place, let us suppose that the indictment charges a sale merely of some known and definite quantity of liquor, which, as a matter of arithmetic, is less than the quantity named in the statute, but without an additional allegation that the sale was "in a less quantity than" such minimum. Will this be sufficiently certain? Many of the authorities return an affirmative answer. They hold that if the defendant is charged with selling "one pint," "one gill," etc., this definitely means that he sold that quantity and no more; and that an allegation that the pint or gill sold was less than a quart, a gallon, etc., would be superfluous and unnecessary.²¹⁰ But this very sensible doctrine is not universally accepted. In several cases, the courts,

²⁰⁷ *Grupe v. State*, 67 Ind. 327; *State v. Mondy*, 24 Ind. 268; *State v. Wilkson*, 36 Mo. App. 373; *Blakely v. State*, 57 Miss. 680; *State v. Chambless*, 45 Ark. 349.

²⁰⁸ *State v. Mondy*, 24 Ind. 268.

²⁰⁹ *State v. Zeitler*, 63 Ind. 441; *State v. Shaw*, 2 Dev. 198.

²¹⁰ *Reams v. State*, 23 Ind. 111; *McCool v. State*, Id. 127; *Willard v. State*, 4 Ind. 407; *State v. Owen*, 15 Mo. 506; *State v. Lavake*, 26 Minn. 526, 6 N. W. Rep. 339, 37 Am. Rep. 415; *State v. Bach*, 36 Minn. 234, 30 N. W. Rep. 764; *State v. Wyman*, 42 Minn. 182, 43 N. W. Rep. 1116.

taking a refined and hypercritical view of the question, have been led to the conclusion that an allegation charging the sale of a pint, a bottle, a gill, etc., is not enough. They say it does not affirmatively appear from such an allegation that the quantity specified was not part of a larger quantity sold at the same time, and which might be above the statutory amount; and hence the charge is insufficient, unless it adds that the defendant sold no more than the amount named, or that the sale was of a quantity less than that fixed by law as the limit.²¹¹ "It is undoubtedly true," says the court in Indiana, "that courts and juries may legally take notice of known and established measures of quantity; they may notice that a gill is a quantity less than a quart. But does the allegation bring the defendant within the prohibition? We think not. The gill sold may have been but part of a larger quantity, a quart or more. Suppose the defendant sold a quart, which he had a right to do without license; it would be true that he sold a gill, it would be true that he did just what the information charges him with doing."²¹² And again: "The question is not whether the courts will take notice of the standards of measure, and therefore that a gill is less than a quart; but whether the courts can or will legally assume that, because the appellant sold a gill, he did not sell any more at the same time, and therefore that he committed an offense. . . . The gill may have been but a part of the larger quantity sold."²¹³ But the answer to this argument is not far to seek. On every principle of the right use of language, a statement that the defendant sold a gill excludes the idea that he sold a quart. And if, in point of fact, the gill sold was part

²¹¹ *Comm. v. Odlin*, 23 Pick. 275; *People v. Bradt*, 10 N. Y. Supp. 157, 46 Hun, 445; *Struckman v. State*, 21 Ind. 160; *Wood v. State*, Id. 276; *Arbintrobe v. State*, 67 Ind. 267, 33 Am. Rep. 86; *State v. Fanning*, 38 Mo. 409.

²¹² *Struckman v. State*, 21 Ind. 160.

²¹³ *Arbintrobe v. State*, 67 Ind. 267, 33 Am. Rep. 86. The Indiana practitioner will observe that the supreme court of that state has several times vacillated from one side of this question to the other, although the doctrine finally ac-

cepted appears to be that the specification of a particular quantity is *not* alone sufficient. Compare the following line of cases: *Willard v. State*, 4 Ind. 407; *Struckman v. State*, 21 Ind. 160; *Wood v. State*, Id. 276; *Reams v. State*, 23 Ind. 111; *McCool v. State*, Id. 127; *Smith v. State*, Id. 132; *State v. Mondy*, 24 Ind. 268; *State v. Zeitler*, 63 Ind. 441; *Arbintrobe v. State*, 67 Ind. 267, 33 Am. Rep. 86; *Grupe v. State*, 67 Ind. 327; *Quinn v. State*, 123 Ind. 59, 23 N. E. Rep. 977.

of a larger quantity, that is entirely a matter of evidence, which the courts are not called upon, in advance, either to assume or to repudiate.

But if the doctrine prevails that the specification of a known quantity is not in itself sufficient, the question arises whether the addition of a clause, "the same being then and there less than" the statutory limit, would make the indictment sufficiently certain. Several cases hold that it would.²¹⁴ But these decisions cannot be sustained on principle. Suppose that the indictment now reads, "did sell one gill of intoxicating liquor, the same being then and there less than a quart." We may now say—meeting subtlety with subtlety—that the interpolated phrase will not aid the indictment, because it adds nothing to the information of the court or the certainty of the charge. It merely alleges that, at the time and place of the sale, a gill was less than a quart—a fact which would be judicially noticed. And the indictment, as thus amended, might be true and yet charge no offense. For a gill (being, as alleged, less than a quart) might still be part of a larger quantity sold. On the whole, therefore, if this very technical doctrine is to prevail, we conceive that the only safe course for the pleader is to follow the words of the statute and lay the precise quantity under a *videlicet*. He should allege that the defendant sold liquor "in a quantity less than one quart, to wit, one gill," of course varying the quantities to suit the statute. An allegation so expressed is of unquestioned propriety.²¹⁵

If the same statute, in its different clauses, prescribes different quantities or limits for different persons or under different conditions, the indictment must clearly show under which clause the defendant is prosecuted. Thus, under a statute requiring a license—"First, for selling in quantities less than a quart, . . . second, for selling in quantities of one quart and less than five gallons," etc., an indictment which charges a sale "by the measure, less than a gallon, to wit, by the quart," is fatally defective, as failing to show whether defendant is charged under the first or second paragraph.²¹⁶ But

²¹⁴ *Smith v. State*, 23 Ind. 132; *Quinn v. State*, 123 Ind. 59, 23 N. E. Rep. 977; *Zarresseller v. People*, 17 Ill. 101.

²¹⁵ *Comm. v. Odlin*, 23 Pick. 275. See, also, *State v. Arbogast*, 24 Mo. 363.

²¹⁶ *State v. Sutton*, 100 N. Car. 474, 6

where the act prohibits the sale of liquor "in less quantity than a quart at a time" without a license, an indictment for selling less than a quart need not allege that the sale was made at one time.²¹⁷

§ 473. Where Quantity is not Material to the Offense.

If the quantity of liquor sold is not made, by the statute, a material part of the offense,—as, where the law prohibits the sale of *any* liquor to be drunk on the premises of the seller,—the indictment need not contain any allegation as to the quantity sold.²¹⁸ So, on an indictment for the sale of liquor on Sunday, it is not material to prove the particular kind or quantity of liquor sold, and if the kind or quantity is alleged in the indictment under a *videlicet*, the allegation may be treated as surplusage.²¹⁹ The same is true of a prosecution for selling to a person intoxicated at the time; any allegation of the quantity, not impossible or repugnant, will be held sufficient, even though it may be described in a form which would not be accepted if the quantity were a material ingredient in the offense.²²⁰ On similar principles, a count charging the keeping of "intoxicating liquors," with intent to sell the same unlawfully, need not specify the kind or quantity.²²¹ And so an indictment for manufacturing liquor for sale, contrary to the provisions of the act, need not allege the quantity manufactured.²²²

§ 474. Allegation of Price Paid.

It has been held, in numerous cases in the state of Indiana, that an indictment for an unlawful sale of liquor must contain an allegation of the price paid; if it omits this averment, the defect is fatal on motion to quash.²²³ The same cases, however, hold that

S. E. Rep. 687. See, also, *State v. Greenhagen*, 36 Mo. App. 24; *State v. Ryan*, 30 Mo. App. 159.

²¹⁷ *Mullen v. State*, 96 Ind. 304.

²¹⁸ *Comm. v. Churchill*, 2 Metc. (Mass.) 118; *Comm. v. Brown*, 12 Metc. (Mass.) 522; *Plunkett v. State*, 69 Ind. 68; *State*

v. Corll, 73 Ind. 535; *Comm. v. Eaton*, 9 Pick. 165; *Block v. State*, 66 Ala. 493.

²¹⁹ *McCuen v. State*, 19 Ark. 636.

²²⁰ *Berry v. State*, 67 Ind. 222; *Brow v. State*, 103 Ind. 133, 2 N. E. Rep. 296.

²²¹ *State v. Teahan*, 50 Conn. 92.

²²² *Comm. v. Clark*, 14 Gray, 367.

²²³ *Divine v. State*, 4 Ind. 240; *State*

the defect is one that is cured by verdict, and will not sustain a motion for a new trial.²²⁴ The reason of this rule is given as follows: "Every fact essential to be proved should be alleged. Here the pleader alleges a 'sale,' which is a conclusion from the facts, and leaves the important element of price, a fact essential to support the idea of sale, to be inferred. Perhaps, had all the facts been stated, the court might have considered it a barter. It is inverting the order of pleading to allege conclusions and leave the facts to inference."²²⁵ But this doctrine is not generally accepted. On the contrary, the rule established by the decisions in a majority of the states is that the indictment need not specify any price for which the liquor was sold.²²⁶ That the transaction was not a gift or a barter is sufficiently indicated, according to these authorities, by the use of the word "sell." That term imports a price paid or agreed to be paid, and no further particularity under that head is requisite. And where an indictment for selling or bartering liquor does not allege any price as having been paid, neither need it aver in terms that it was done "for purposes of gain."²²⁷ So, where the defendant was charged with selling a gallon of liquor for the sum of "about \$1.25," it was held that, as the amount received for the liquor was entirely immaterial, the indictment was sufficient.²²⁸ On similar principles, an affidavit that defendant bartered a pint of liquor to a minor for a pool check was held sufficient, though not stating the value of the check, or that it was an article of value.²²⁹ And where an information charged that defendant "did sell, barter, and give away intoxicating liquor," but did not allege what, if anything, was paid for the liquor, it was held, on motion to quash, that the words charging a sale and barter should be stricken out as sur-

v. Miles, Id. 577; State v. Lockstand, Id. 572; Miles v. State, 5 Ind. 215; Snyder v. State, Id. 194; Segur v. State, 6 Ind. 451; State v. Downs, 7 Ind. 237; Hubbard v. State, 11 Ind. 554; Cool v. State, 16 Ind. 355; State v. Jacks, 54 Ind. 412.

²²⁴ Hare v. State, 4 Ind. 241.

²²⁵ Divine v. State, 4 Ind. 240.

²²⁶ State v. Downer, 21 Wis. 274; State

v. Muntz, 3 Kans. 383; State v. Rogers, 39 Mo. 431; State v. Fanning, 38 Mo. 359; State v. Pischel, 16 Nebr. 608, 21 N. W. Rep. 468; State v. Hines, 13 R. I. 10. See also, Forkner v. State, 95 Ind. 406; Schlicht v. State, 56 Ind. 173

²²⁷ Schlicht v. State, 56 Ind. 173.

²²⁸ Clare v. State, 5 Iowa, 509.

²²⁹ Forkner v. State, 95 Ind. 406.

plusage, and that the information sufficiently charged the offense of giving away intoxicating liquor.²³⁰

§ 475. Charging Sale of Liquor to be Drunk on Premises.

In several of the states it is made a misdemeanor to sell liquor "to be drunk on the premises where sold," when the sale is made by a person having no license or having a license limited to sales for other purposes. In an indictment for this offense, it is essential to allege the purpose and intent of the vendor that the liquor should be consumed where it was sold.²³¹ And it is not sufficient to charge a sale of the liquor and that the defendant did "suffer and permit" the drinking of the same on the premises.²³² But it is not necessary for the indictment to allege that the liquor *was* drunk on the premises, or that it was drunk anywhere, because that is not necessary to complete the offense.²³³ Where the allegation is that the liquor was sold "to be drunk on the premises," this is held to be equivalent to charging that it was sold "with the intent to be drunk" on the premises.²³⁴ But prudence will suggest a close following of the language of the statute in the wording of this averment. In some jurisdictions, the prohibition is against the sale of liquor to be drunk "in the house" of the seller. Where this is the case, it is thought to be sufficient to describe the place as "the dwelling-house by the said A. used and occupied."²³⁵ Or it may be described as "a certain building then and there situate and in the possession and occupancy of the said A., erected on," etc.²³⁶ But in Indiana, where the statute requires that the liquor should have been sold to be drunk on premises owned or controlled by the defendant, it is not sufficient to charge a sale of liquor "to be then and there drunk on the premises where sold."²³⁷ As to whether it is necessary to describe the situation of the premises with any degree of particularity, the authorities leave us in some

²³⁰ Eagan v. State, 53 Ind. 162.

²³¹ See Layton v. State, 49 Ind. 229; State v. Williamson, 19 Mo. 384; Picket v. State, 22 Ohio St. 405.

²³² Vanderwood v. State, 50 Ind. 26; Blough v. State, 121 Ind. 355, 23 N. E. Rep. 153.

²³³ Eisenman v. State, 49 Ind. 511.

²³⁴ Bilbro v. State, 7 Humph. 534.

²³⁵ Comm. v. Moulton, 10 Cush. 404.

²³⁶ Hintermeister v. State, 1 Iowa, 101.

²³⁷ State v. Woolsey, 92 Ind. 131.

doubt. In an early case in Indiana, where the indictment charged the defendant A. with retailing liquor in N. county, without a license, to be drunk in the house of him, the said A., where the same was sold as aforesaid, it was held that the fact that the said house was in N. county (supposing it ought to appear) was shown with sufficient certainty.²³⁸ And in New York, there is a ruling that the premises may be described as in a designated ward in a city, without stating the name of the street or the number of the house.²³⁹

§ 476. Alleging Sale in Prohibited Places.

When the prosecution is upon a statute prohibiting the sale of liquor in the vicinity of a church, camp-meeting, school, agricultural fair, etc., the place is of the essence of the offense, and must be described with such particularity as to exclude any ambiguity or uncertainty. And the allegations must be such as to bring the case exactly within the statute. We may illustrate this rule by a decision in Indiana, where the indictment was found under an act forbidding the sale of liquor within two miles of any religious assembly at a "booth, tent, wagon, huckster shop, or other place erected, brought, kept, continued, or maintained within the distance aforesaid." The indictment charged a selling within one-half mile of a religious assembly, but did not charge that the liquor was sold at a booth, etc. And it was held that it charged no offense.²⁴⁰ But where a special statute prohibited the sale of liquor within three miles of "a Methodist church in M. county, known by the name of White Church," and an indictment charged a sale within three miles of "White Church in M. county," it was held that the description of the church was sufficient.²⁴¹ When the prohibition is against the sale of liquors within a certain distance of any academy, etc., the indictment need not allege the incorporation of the academy; but if such allegation is made, it must be proved.²⁴² And the indictment is not defective for failing to allege that the academy is in the county in which the

²³⁸ *State v. Shearer*, 8 Blackf. 262.

²³⁹ *Schwab v. People*, 4 Hun, 520.

²⁴⁰ *Bouser v. State*, 1 Ind. 408.

²⁴¹ *Block v. State*, 66 Ala. 493.

²⁴² *Blackwell v. State*, 36 Ark. 178. In Tennessee, we find a ruling that the indictment need not designate the institution. *State v. Odam*, 2 Lea, 220.

indictment is found, if it avers that the order of the county court prohibiting the sale within three miles of the designated academy was made in compliance with the act.²⁴³ An indictment for selling liquor within a district wherein such sale has been prohibited by a special act must be framed under that act, and not under the general liquor law.²⁴⁴

§ 477. Allegation of Sale to Minor.

An indictment for selling liquor to a minor, contrary to the statute, may describe the purchaser as "then and there a person under the age of twenty-one years," and it is not necessary to give his age more specifically.²⁴⁵ There is also authority for the proposition that the use of the word "minor," in such an indictment, without more, sufficiently describes the person's age.²⁴⁶ If the statute makes the sale of liquor to a minor an offense only when it is "knowingly" done, it is probable that the indictment should contain an allegation of the seller's knowledge of the buyer's minority, as this is then a constituent element of the offense. This might be done by the use of some such formula as "to him then and there known to be a person under the age of twenty-one years," or "well knowing that the said A. was then and there a minor." But if this word is not found in the statute, there is a great controversy, as we have already seen,²⁴⁷ as to the validity of a defense of ignorance or mistake of fact as to the buyer's age. We apprehend, however, that it is not necessary for the indictment to charge knowledge. For if the defendant is allowed to excuse himself on the ground of ignorance, this is a defense which he must set up and prove; it is not a matter which the indictment should anticipate and negative.²⁴⁸ Neither, except when it is made an essential prerequisite by the statute, is it necessary to allege a previous notice to the defendant forbidding him to sell to the minor.²⁴⁹ Where

²⁴³ *Wilson v. State*, 35 Ark. 414.

²⁴⁴ *State v. Orton*, 41 Ark. 305; *State v. Cathey*, Id. 308.

²⁴⁵ *Brinkman v. State*, 57 Ind. 76; *Schaffer v. State*, 106 Ind. 319, 6 N. E. Rep. 818.

²⁴⁶ *Waller v. State*, 38 Ark. 656; *Comm. v. O'Brien*, 134 Mass. 198.

²⁴⁷ *Supra*, §§ 416-418.

²⁴⁸ *Ward v. State*, 48 Ind. 289.

²⁴⁹ *State v. Hyde*, 27 Minn. 153, 6 N. W. Rep. 555.

the act forbids the sale of liquor "to any white person under the age of twenty-one years," an indictment is defective which does not allege that the minor is a white person.²⁵⁰ Further, although the matter may not be entirely settled upon the authorities, the better opinion appears to be that the *name* of the minor should be stated in the indictment if known, or, if not known, that he should be described as a person to the grand jury unknown. We have seen that there are substantial reasons for requiring an allegation of the name of the purchaser, when he belongs to a specially protected or prohibited class.²⁵¹

In some of the states, the sale of liquor to a minor is lawful when made in pursuance of the written permission of his parents or guardian. And when this is the case, the theory of such permission having been given must be met by an appropriate negative allegation in the indictment.²⁵² Where the statute prohibits such sale "without the written consent *or* request" of the parent, an indictment alleging a sale "without the written consent *and* request" of such person, does not charge the statutory offense.²⁵³ And where the sale is charged to have been made without the written consent of the minor's parents, but the indictment does not negative the consent of his guardian, it is bad on demurrer.²⁵⁴ So, an indictment charging a sale without the consent of the minor's "father" only is defective.²⁵⁵ And the same is true of an allegation which only negatives authority from the mother of the purchaser.²⁵⁶ But an indictment which alleges that the sale was made "without the consent of the parent, guardian, or person having the legal charge of the said" minor, is not demurrable because it omits the word "master" after the word "guardian," as used in the statute.²⁵⁷ And where the statute prohibits a sale "without the written consent or order of the parent or guardian,"

²⁵⁰ Comm. v. Ewing, 7 Bush, 105.

²⁵¹ *Supra*, § 464.

²⁵² Parkinson v. State, 14 Md. 184, 74 Am. Dec. 522.

²⁵³ Comm. v. Hadcraft, 6 Bush, 91.

²⁵⁴ State v. Emerick, 35 Ark. 324. But compare State v. Shoemaker, 4 Ind. 100.

²⁵⁵ Lantzner v. State, 19 Tex. App. 320.

²⁵⁶ Newman v. State, 63 Ga. 533. But such an indictment, if not demurred to, is made valid by evidence that the minor's father was dead and he had no guardian. Reich v. State, 63 Ga. 616.

²⁵⁷ Weed v. State, 55 Ala. 13.

an indictment is not demurrable because it omits the words "or order."²⁵⁸

§ 478. Allegation of Sale to Habitual Drunkard.

In indictments for the sale of liquor to habitual drunkards, considerable strictness is required in conforming to the statutory definition of the offense. But if the sale is prohibited to a person "in the habit of *being* intoxicated," an indictment charging a sale to a person "in the habit of *becoming* intoxicated" is sufficient.²⁵⁹ It is especially necessary that the indictment should show that the intemperate habits of the purchaser existed at the time of the particular sale charged. It has been held that this requirement is sufficiently met by an allegation that the defendant "did then and there unlawfully sell to one H. intoxicating liquor, he, the said H., being a person in the habit of becoming intoxicated."²⁶⁰ The prudent pleader, however, will see to it that there is no room for ambiguity on this point. As a general rule, it is not necessary to aver that the defendant knew of the intemperate habits of the person to whom the liquor was sold; the sale is made at the peril of the party selling.²⁶¹ The exception to this rule is where the statutory offense is "knowingly" selling to an inebriate. In such case, knowledge being an essential element of the offense, the indictment must charge that the accused knew the buyer to be a drunkard.²⁶² The name of the purchaser ought also to be stated in the indictment, if it is known. The same reasons for this requirement exist which obtain in the case of a sale to a minor, as noticed in the preceding section. In Indiana, the statute prohibits the sale of liquor to an habitual drunkard "after notice shall have been given him in writing" that such person is a drunkard. Under this law, an information charging such sale after due notice in writing had been served upon the proprietor of the

²⁵⁸ *Mogler v. State*, 47 Ark. 109, 14 S. W. Rep. 478.

²⁵⁹ *State v. Dolan*, 122 Ind. 141, 23 N. E. Rep. 761.

²⁶⁰ *State v. Dolan*, 122 Ind. 141, 23 N. E. Rep. 761. Compare *Wiedemann v. People*, 92 Ill. 314.

²⁶¹ *Mapes v. People*, 69 Ill. 523; *Werneke v. State*, 50 Ind. 22. See, *supra*, § 426.

²⁶² *Comm. v. Bell*, 14 Bush, 433. See *Parker v. State*, 4 Ohio St. 563.

saloon in which the accused was employed, which notice was left at such saloon, is insufficient in not charging notice to the accused.²⁶³

An information in the recorder's court of a town for the violation of an ordinance prohibiting the sale or gift of intoxicating liquors to an habitual drunkard is sufficient though it does not set out the ordinance literally, but only states its legal effect as making it unlawful to furnish liquor to such person.²⁶⁴

§ 479. Charging Sale on Sunday.

In an indictment under the laws prohibiting the sale of liquor on Sunday, the day of the commission of the offense may be described as "the first day of the week, commonly called Sunday,"²⁶⁵ or as "the Sabbath day,"²⁶⁶ or otherwise according to the language of the statute. And an indictment which charges that the defendant, on a specified day, "the same being the Sabbath day, in the night-time of said day, so being the Sabbath day," did unlawfully keep open a tippling-house, is sufficient.²⁶⁷ It is usual and proper to add a specification of the day of the month and the year. And in this respect the time should be laid with sufficient certainty to show that it is not beyond the period of limitations. But the day of the month is not an essential element of the offense. The gist of the offense is the doing of the act on Sunday, and the statement of the day of the month is not more important than in other offenses. Hence if the indictment charges the offense to have been committed on Sunday, but upon a day of the month which, as a matter of fact and judicial knowledge, was some other day of the week, the error is immaterial and the allegation is good.²⁶⁸ The vital part of the allegation is that it should name Sunday as the day of the commission of the offense. It is not sufficient to charge that the sale was made on a specified

²⁶³ State v. Smith, 122 Ind. 178, 23 N. E. Rep. 714. See, also, Geraghty v. State, 110 Ind. 103, 11 N. E. Rep. 1.

²⁶⁴ Woods v. Prineville, 19 Oreg. 108, 23 Pac. Rep. 880.

²⁶⁵ State v. Roehm, 61 Mo. 82; State v. Kock, Id. 117; Henry v. State, 113 Ind. 304, 15 N. E. Rep. 593.

²⁶⁶ State v. Peterson, 38 Minn. 143, 36 N. W. Rep. 443.

²⁶⁷ Kroer v. People, 78 Ill. 294.

²⁶⁸ State v. Eskridge, 1 Swan, 413; Roy v. State, 91 Ind. 417; Marquardt v. State, 52 Ark. 269, 12 S. W. Rep. 562; Frasier v. State, 5 Mo. 536; Megowan v. Comm., 2 Met. (Ky.) 3; People v. Ball, 42 Barb.

day in a specified month and year, even though, in point of fact, that date fell on Sunday.²⁶⁹ And on an even stronger reason, if the given date was not a Sunday, the allegation is bad.²⁷⁰ Since only the day of the week is here important, it follows that greater latitude will be allowed in the statement of the date than would otherwise be tolerated. Thus, a complaint charging the sale of liquor "on or about the 17th day of February, 1884, that being the first day of the week, commonly called Sunday," is sufficiently definite as to time.²⁷¹ In prosecutions for this offense, the quantity of liquor sold, as well as the place where it was drunk, are immaterial, and it is not necessary that the indictment should specify either.²⁷² But under the Indiana statute, it must be averred and proved that the liquor was sold to be drunk as a beverage.²⁷³ Where the act prohibits the sale of liquor on Sunday "unless the person to whom the same is sold shall have first procured a written prescription therefor from some regular practising physician of the county where the same is sold," the omission of the word "therefor" in reference to a purchaser's failure to obtain a prescription is not fatal to an indictment against a druggist.²⁷⁴

224; *Hoover v. State*, 56 Md 584; *State v. Drake*, 64 N. Car. 589; *Comm. v. Newton*, 8 Pick. 234; *Comm. v. Kingsbury*, 5 Mass. 496; 1 Bishop, *Crim. Procd.* § 399; *Wharton, Crim. Plead.* § 121. Compare *Werner v. State*, 51 Ga. 426.

²⁶⁹ *Gilbert v. State*, 81 Ind. 565.

²⁷⁰ *Robinson v. State*, 38 Ark. 548.

²⁷¹ *Brown v. State*, 16 Nebr. 658, 21 N. W. Rep. 454. In this case Reese, J., observed: "While it is indefinitely alleged to be 'on or about' the date named, yet it is definitely charged to have been on the particular day designated by the statute. This was equivalent to charging the act to have been committed 'on the first day of the week, commonly called Sunday, and which was on or about the 17th day of February, 1884.' The substantial alle-

gation of date was necessary for the purpose of showing that the prosecution was not barred by the statute of limitations, but for no other purpose. The particular date on which the Sunday occurred was wholly immaterial, except for the purpose named. The object and purpose of the provision of the section under which the complaint was drawn, was to prevent the sale of liquors on the day known as Sunday. The sale is alleged to have been on that day and within the time in which the prosecution could be maintained. This is sufficient." See, *per contra*, *Effinger v. State*, 47 Ind. 235.

²⁷² *Megowan v. Comm.*, 2 Met. (Ky.) 3.

²⁷³ *Morel v. State*, 89 Ind. 275; *Dowdell v. State*, 58 Ind. 333.

²⁷⁴ *Shepler v. State*, 114 Ind. 194, 16 N. E. Rep. 521.

§ 480. Charging Sale on Election Day.

When the statute prohibits the keeping open of saloons, or the sale of liquor, on or during the day of any election, it is considered, in some of the states, that the indictment is not sufficient if it merely charges a sale made "on an election day," without further alleging that an election was in fact held on that day; because if there was no election, no offense was committed, and this essential fact cannot be left to inference.²⁷⁵ In Tennessee, however, the doctrine prevails that it will be presumed that an election was held on the day legally appointed for it, and hence that the indictment need not state that an election was actually opened and held; if no election was held, this would be a matter of defense.²⁷⁶ In Texas, it is necessary to aver, not merely that an election was held, but what the election was for.²⁷⁷ An allegation that the election was "held by lawful authority," for the election of one alderman, and that it was then and there being held "by lawful legal authority," is sufficiently specific, without alleging in terms that it was a special election, ordered by the city council, and that the required notice had been given.²⁷⁸ Under a statute which makes it an offense for one to keep a bar open on a day on which an election is held in "his" precinct, one cannot be indicted for selling in a certain justice's precinct on a day when an election was there being held, without an allegation that it was *his* precinct.²⁷⁹ In Indiana, it is held that the indictment is defective if it does not state the name of the township in which the offense was committed, although the sale is alleged to have been made on a day upon which the law requires general township elections to be held.²⁸⁰

²⁷⁵State v. Starney, 71 N. Car. 202; Prather v. State, 12 Tex. App. 401.

²⁷⁶State v. Powell, 3 Lea, 164; State v. Irvine, 3 Heisk. 155.

²⁷⁷Hoskey v. State, 9 Tex. App. 202.

²⁷⁸Janks v. State, (Tex. App.) 15 S. W. Rep. 815.

²⁷⁹Smith v. State, 18 Tex. App. 454. See Janks v. State, (Tex. App.) 15 S. W. Rep. 815.

²⁸⁰State v. Weaver, 83 Ind. 542.

§ 481. Being a Common Seller.

Under the statutes in force in some of the New England states, as we have seen in an earlier chapter, penalties are imposed upon any person who shall "presume to be a common seller" of intoxicating liquors, without due license or authority therefor. In charging this offense, it is sufficient for the indictment to aver that the defendant, at a certain time and place, "was, without being duly authorized or appointed thereto according to law, a common seller of intoxicating liquors, against the peace of the commonwealth and contrary to the form of the statute in such case made and provided."²⁸¹ The indictment need not set forth any particular sales, or any number of sales; and if particular instances of selling are alleged, but defectively, the allegation may be treated as surplusage and excised without destroying the indictment.²⁸² And if, after the averment that defendant was a common seller, it is added that he "did then and there, as aforesaid, sell and cause to be sold to divers persons, to the jurors unknown, divers quantities of strong liquors," the indictment charges but one offense, and is not bad for duplicity.²⁸³ Even if a particular sale of a definite quantity to a named person is set out in the same count, in addition to the charge of the general offense, this will not vitiate the indictment.²⁸⁴ As to the allegation of time, the authorities hold that if the indictment avers that the defendant at a certain place, on a certain day, and at said place from said day to the day of finding the indictment, "was then and there a common seller of intoxicating liquors," it lays the time with sufficient certainty and charges but one offense.²⁸⁵ An indictment for this offense, charging its commission at a town named within the state, need not allege that the liquors sold were in the state at the time of the sale.²⁸⁶ Two

²⁸¹ Comm. v. Hove, 11 Gray, 462.

²⁸² Comm. v. Edwards, 4 Gray, 1; Comm. v. Wood, Id. 11; Comm. v. Hart, 11 Cush. 130; Comm. v. Pray, 13 Pick. 359.

²⁸³ State v. Stinson, 17 Me. 154; State v. Churchill, 25 Me. 306. See, also, State v. Nutt, 28 Vt. 593.

²⁸⁴ Goodhue v. Comm., 5 Metc. (Mass.) 553.

²⁸⁵ Comm. v. Woods, 9 Gray, 131; Comm. v. Kingman, 14 Gray, 85; Comm. v. Snow, Id. 20.

²⁸⁶ Comm. v. Jones, 7 Gray, 415.

persons may be jointly indicted under these statutes. And in such case, the regular course is to make the averment specific as to each, and to negative the license or authority of each. But it seems that an indictment averring that two persons at a certain time and place "was a common seller of intoxicating liquors," is sufficient to sustain a conviction of the first, after a *noile prosequi* has been entered as to the second.²⁸⁷

§ 482. Unlawfully Pursuing Business of Liquor-Selling.

Where the statute makes it an offense to engage in, or carry on, or pursue the business or occupation of a dealer in liquors, without paying the required tax or procuring the necessary license, it is not necessary that the indictment should allege a specific sale or sales, but it is sufficient to charge that the accused was engaged in the business of selling, etc.²⁸⁸ Regard should be had to the statutory definition of the offense, and the most prudent course is to follow the language there employed, substantially if not literally. For example, where the statute refers to the selling of "vinous, spirituous, or malt liquors," an indictment charges no offense when it alleges that defendant engaged in the business of selling "spirituous, vinous, or malt liquors, or intoxicating bitters," the sale of the last-mentioned article not being necessarily an offense under the statute.²⁸⁹ On the other hand, where the act prohibited by the statute is to "carry on or conduct" the business without license, it is said to be sufficient to charge that defendant "did engage in and manage the business of a dealer in intoxicating liquors" without procuring a license.²⁹⁰ An indictment for this offense must contain an allegation of the place at which the business was carried on.²⁹¹ Under the statute in Michigan, it is held that an averment that a druggist sold whisky to be used as a beverage sufficiently states that he was engaged in a business that required payment of the special tax required of retail liquor dealers, a druggist

²⁸⁷ Comm. v. Colton, 11 Gray, 1.

²⁸⁸ People v. Breidenstein, 65 Mich. 65, 31 N. W. Rep. 623.

²⁸⁹ Allred v. State, 89 Ala. 112, 8 South. Rep. 56.

²⁹⁰ Roberts v. State, (Fla.) 7 South. Rep. 861.

²⁹¹ Harris v. State, 50 Ala. 127.

not being exempt from such tax, if he desires to sell liquor to be used as a beverage.²⁹²

§ 483. Keeping Liquors for Unlawful Sale.

An indictment for a violation of a statute which prohibits the keeping of intoxicating liquors, with intent to sell the same unlawfully, will in general be sufficient if it substantially follows the language of the statute.²⁹³ But a literal copying of the statutory words is not always necessary. It will be sufficient, for instance, to allege a keeping of liquors "for the purpose of sale," although the statute uses the words "with intent to sell."²⁹⁴ And an allegation of an intent "unlawfully to sell the same within the commonwealth" is sufficient, although not alleging an intent to sell in the place where the liquor is kept.²⁹⁵ But an allegation that the accused did "keep . . . for the purpose of sale, and not for the purpose of exportation," is not admitted to be equivalent to an allegation that the liquors were kept for sale and not for sale for exportation.²⁹⁶ Nor will the indictment be sufficient to sustain a conviction of the person having the liquors in his possession, without an allegation that the same were intended *by him* for sale in violation of law.²⁹⁷ An indictment which charges that in a certain building the defendant kept intoxicating liquors for sale, and did then and there sell the same, does not charge two distinct offenses and is not bad for duplicity.²⁹⁸ And the same is true of an allegation that the defendant "did keep, and was concerned, engaged, and employed in owning and keeping intoxicating liquors to sell."²⁹⁹ The place of the commission of the offense should of course be alleged. But where the indictment charges the illegal keeping of liquors for sale, as distinguished from charging the

²⁹² *Luton v. Palmer*, 69 Mich. 610, 37 N. W. Rep. 701. See, also, *People v. Quinn*, 74 Mich. 632, 42 N. W. Rep. 604; *Allen v. State*, (Tex. App.) 13 S. W. Rep. 998.

²⁹³ *Comm. v. Gilland*, 9 Gray, 3.

²⁹⁴ *State v. Mohr*, 53 Iowa, 261, 5 N. W. Rep. 183.

²⁹⁵ *Comm. v. Gillon*, 148 Mass. 15, 18

N. E. Rep. 584. See *State v. Perkins*, 63 N. H. 368.

²⁹⁶ *State v. Campbell*, 12 R. I. 147.

²⁹⁷ *State v. Learned*, 47 Me. 426.

²⁹⁸ *State v. Becker*, 20 Iowa, 438; *State v. Baughman*, Id. 497.

²⁹⁹ *Vaughn v. State*, 5 Clarke, (Iowa,) 369.

maintenance of a tenement for that purpose, a variance as to the place is not material.³⁰⁰ It is also held that the keeping of liquors for sale may be a continuing offense, and hence may be alleged with a *continuando*.³⁰¹ Finally, it appears that the license or authority of the defendant should be negatived. In a case in Massachusetts, where the statute enacts that "no person shall sell, or expose or keep for sale, spirituous or intoxicating liquors, except as authorized in this act," a complaint which merely alleged that the defendant "unlawfully did expose and keep for sale intoxicating liquors, with intent unlawfully to sell the same within this commonwealth," was held insufficient for not alleging want of authority.³⁰²

§ 484. Keeping Place for Unlawful Sale of Liquor.

Where the statute prohibits all unauthorized persons to "keep a place" or "maintain a tenement," used for the illegal keeping or sale of intoxicating liquors, an indictment, charging a violation of such prohibition, will in general be good if it substantially follows the language of the statute.³⁰³ But if this is attempted, no material words of the statute can safely be omitted. For example, if the statute declares that no person without a license shall "engage in the business of keeping" a tavern, an allegation that the defendant "did keep" such a place is demurrable.³⁰⁴ And so, if the law is directed against the keeping of a bar-room "used as a place of resort," the omission of the words quoted will make the indictment defective, though it seems it may be amended at any stage of the proceedings.³⁰⁵ Again, under a complaint which merely charges defendant with keeping "a saloon as a place of public resort, where intoxicating liquors were sold in violation of law," he cannot be convicted of the offense of sell-

³⁰⁰ *Comm. v. Kern*, 147 Mass. 595, 18 N. E. Rep. 566. See *Lincoln v. Smith*, 27 Vt. 328.

³⁰¹ *Comm. v. Hersey*, (Mass.) 9 N. E. Rep. 837.

³⁰² *Comm. v. Byrnes*, 126 Mass. 248.

³⁰³ See *State v. Adams*, 16 Ark. 497; *State v. Hoard*, 123 Ind. 34, 23 N. E.

Rep. 972; *State v. McGough*, 14 R. I. 63; *State v. Price*, 75 Iowa. 243, 39 N. W. Rep. 291; *Comm. v. Purdy*, 147 Mass. 29, 16 N. E. Rep. 745; *Comm. v. Kimball*, 7 Gray, 328; *Comm. v. Davenport*, 2 Allen, 299.

³⁰⁴ *Pettibone v. State*, 19 Ala. 586.

³⁰⁵ *State v. Stone*, 54 Vt. 550.

ing liquors without a license.³⁰⁶ And so, under the Massachusetts statute, which provides that no unlicensed person shall "keep or expose for sale" any intoxicating liquors, an indictment charging the defendant with "keeping an open bar," or "keeping a public bar for the sale of spirituous and intoxicating liquors," does not sufficiently set forth the offense.³⁰⁷ But an indictment for this species of offense is not bad because it contains two counts setting forth the same offense in the same manner, with certain slight verbal variations.³⁰⁸ And an averment that the defendant kept a tenement "used for the illegal sale and illegal keeping of intoxicating liquors" is not bad on the ground of duplicity.³⁰⁹ An indictment which charges the defendant with keeping a disorderly liquor-shop, and sets forth the particular disorderly acts of those allowed to drink at defendant's shop, is good at common law.³¹⁰ In a recent decision in Massachusetts, it was held that, on an indictment for maintaining a place kept by a "club" for the purpose of selling and distributing intoxicating liquors, there is no variance, though the club is incorporated under a name other than that stated in the indictment, it being as well known by one name as by the other.³¹¹ If the indictment charges that the tenement was used for the "illegal sale and illegal keeping of intoxicating liquors," it need not more distinctly negative the defendant's authority to sell or keep liquors.³¹²

§ 485. Keeping a Tippling-House.

Under the statute in Kentucky, an indictment charging that the defendant "did then and there, in said house, keep a tippling-house, without first having obtained a license then and there to keep a tavern," is held to be good and sufficient.³¹³ But an allegation that defendant "kept a tippling-house in the town of P. by then and there

³⁰⁶ *State v. Gumber*, 37 Wis. 298.
³⁰⁷ See *Volmer v. State*, 34 Ark. 487.

³⁰⁸ *Comm v. Hickey*, 126 Mass. 250.

³⁰⁹ *State v. Doyle*, 15 R. I. 527, 9 Atl. Rep. 900; *State v. Brady*, 16 R. I. 51, 12 Atl. Rep. 288.

³⁰⁹ *Comm. v. Foss*, 14 Gray, 50.

³¹⁰ *State v. Hoard*, 123 Ind. 34, 23 N. E. Rep. 972.

³¹¹ *Comm. v. Jacobs*, (Mass.) 25 N. E. Rep. 463.

³¹² *Comm. v. Edds*, 14 Gray, 406.

³¹³ *Comm. v. Turner*, 4 B. Mon. 4.

retailing," etc., is not good, because it does not charge that it was in a house kept by him for that purpose, which is necessary to make out the statutory offense.³¹⁴ It has been ruled, in the same state, that an indictment charging the defendant with keeping a tippling-house, "not under pretense of keeping a tavern," is good after verdict, as these terms manifestly imply that he had no license.³¹⁵ In Indiana, the courts have sustained an indictment for keeping a tippling-house, which alleged that the defendant on, etc., at, etc., kept a certain tippling-house wherein spirituous liquors were sold, without license, to be drunk in and about the same, which tippling-house was then and there kept by him in a disorderly manner, to the annoyance, etc., contrary to the form of the statute.³¹⁶

§ 486. Charging Maintenance of Nuisance.

When the prosecution is upon a statute which provides that all places kept for the illegal sale of liquor shall be deemed public nuisances, and directs the punishment of the keeper of such a place, an indictment against such person will ordinarily be good if it describes the offense in the language of the statute.³¹⁷ It must be distinctly shown, on the indictment, that the place complained of was a common nuisance. This is sufficiently done by an allegation that the defendant kept and maintained a certain tenement, used for the illegal sale and illegal keeping of intoxicating liquors, whereby, and by force of the statute in such case made and provided, the said tenement, so kept, maintained, and used, was then and there a common nuisance.³¹⁸ But where the statute defines as nuisances places "used" for the illegal sale of liquor, it is not sufficient to charge the maintenance of a saloon "resorted to" for such illegal sale.³¹⁹ Nor, under a statute so worded, will the indictment be good if it merely alleges that the building complained of was "occupied" by its owner for such

³¹⁴ *Our v. Comm.*, 9 Dana, 80; *Woods v. Comm.*, 1 B. Mon. 74.

³¹⁵ *Webster v. Comm.*, 7 Dana, 215.

³¹⁶ *Shilling v. State*, 5 Ind. 443.

³¹⁷ See *Skinner v. State*, 120 Ind. 127, 22 N. E. Rep. 115; *State v. Welch*,

(Me.) 7 Atl. Rep. 475; *Comm. v. Wright*, 12 Allen, 190.

³¹⁸ *Comm. v. Howe*, 13 Gray, 26. And see *State v. Freeman*, 27 Iowa, 333.

³¹⁹ *State v. Dodge*, 78 Me. 439, 6 Atl. Rep. 875.

purposes.³²⁰ On the same principle, an allegation that the defendant "kept a grocery and did retail" is not good; it should be alleged that the grocery was kept *for* the retailing of liquors.³²¹ Since it is the essence of the offense of maintaining a liquor nuisance, that intoxicants were kept for sale, or were illegally sold, at the place described, this fact must be distinctly charged in the indictment.³²² And hence it must be averred either that the defendant had sold liquors at the place mentioned, or that he kept them there for the purpose of selling.³²³ But if it is charged that he kept, maintained, and used the building for the illegal sale, and illegal keeping for sale, of intoxicating liquors, no allegation of specific sales will be necessary.³²⁴ It may or may not be essential to charge that the building in which the nuisance was maintained was owned or controlled by the defendant. This will depend upon whether the statute makes such ownership or control a necessary ingredient of the offense.³²⁵ Where the indictment is against the owner of the building, on the charge of knowingly letting it to a tenant for the purpose of being used as a nuisance, it is sufficient to allege that the defendant "a certain room knowingly let to and permitted to be used by one C. for the illegal sale and keeping for sale of intoxicating liquors."³²⁶ As against the person who kept the nuisance, it is not necessary to allege that he knew the place he so kept to be a common nuisance.³²⁷

In relation to the allegation of place, it is to be observed that there is an important distinction between criminal proceedings against the person guilty of maintaining the nuisance and proceedings, *quasi* criminal in their nature, for the abatement of the nuisance itself. In the latter case, the place must be described with great exactness and particularity.³²⁸ But in an indictment against the owner or

³²⁰ Duke v. Marston, (N. H.) 15 Atl. Rep. 222.

³²¹ Hensley v. State, 6 Ark. 252.

³²² Comm. v. Hill, 4 Allen, 589; Comm. v. Kelly, 12 Gray, 175; State v. Adams, (Iowa,) 47 N. W. Rep. 770; State v. Crabtree, 27 Mo. 232.

³²³ State v. Hass, 22 Iowa, 193.

³²⁴ State v. Dorr, 82 Me. 157, 19 Atl. Rep. 157.

³²⁵ See State v. Nickerson, 30 Kans. 545, 2 Pac. Rep. 654; State v. Schilling, 14 Iowa, 455.

³²⁶ State v. Pierce, (Me.) 15 Atl. Rep. 68.

³²⁷ State v. Ryan, 81 Me. 107, 16 Atl. Rep. 406.

³²⁸ Zumhoff v. State, 4 Greene, (Iowa,) 526.

keeper of the alleged nuisance, it is not essential that its location should be designated with any special degree of precision or minuteness, further than to show that it is within the territorial jurisdiction of the court.³²⁹ An averment that defendant kept the nuisance "in a certain frame building under his control" has been held sufficient.³³⁰ And so of an allegation that the nuisance was maintained "in a certain room in the Windsor Hotel" in a named town and county.³³¹ And so of an allegation that the building was situated "at the corner of Depot square in said town," though without stating on which corner.³³² And a charge that defendant "did keep and maintain a certain common nuisance, to wit, a building, to wit, a tenement in a building," is not inconsistent in its description of the place.³³³ In a case in Illinois, the information charged that defendant kept a dram-shop, in which he sold intoxicating liquors to persons intoxicated and to habitual drunkards, whereby the place became and was a public nuisance. In a second count, it charged the sale of intoxicating liquors on the same premises in less quantities than one gallon, without a dram-shop license, and to minors without the written order required by the law, as in the first count. It was held that the information did not charge separate offenses, but only the offense of keeping a common nuisance.³³⁴

In regard to the allegation of time, in indictments for this offense, it is held that the nuisance may be alleged to have been kept and maintained on a day named "and on divers other days and times between that day and the day of finding this indictment." Such an averment states the time with sufficient certainty and is not open to the charge of duplicity.³³⁵ And where an indictment alleged that the

³²⁹ *State v. Becker*, 20 Iowa, 438; *Comm. v. Logan*, 12 Gray, 136; *Comm. v. Hill*, 14 Gray, 24; *Comm. v. Welsh*, 1 Allen, 1; *Comm. v. Skelley*, 10 Gray, 464; *Comm. v. Quinlan*, (Mass.) 27 N. E. Rep. 8; *State v. Kreig*, 13 Iowa, 462; *Howard v. State*, 6 Ind. 444.

³³⁰ *State v. Schilling*, 14 Iowa, 455.

³³¹ *State v. Cox*, 82 Me. 417, 19 Atl. Rep. 857.

³³² *State v. Hall*, 79 Me. 501, 11 Atl. Rep. 181.

³³³ *Comm. v. Lee*, 148 Mass. 8, 18 N. E. Rep. 586.

³³⁴ *Nicholson v. People*, 29 Ill. App. 57. See, also, *State v. Dean*, 44 Iowa, 648.

³³⁵ *Comm. v. Hoyer*, 9 Gray, 292; *Comm. v. Keefe*, Id. 290; *Comm. v. Sheehan*, 143 Mass. 468, 9 N. E. Rep. 839.

defendant used a building for the illegal keeping and sale of liquor, with time and place, in the usual manner, but the allegation that he thereby rendered himself guilty of keeping a nuisance was made with the blank space for the time left unfilled, it was held that the indictment contained a legal and sufficient statement of the time when the offense was committed.³³⁶ It is also ruled that a second clause of a count of an indictment for maintaining a liquor nuisance need not repeat the allegation of time.³³⁷ Two persons may be jointly indicted, one for maintaining a liquor nuisance, and the other for aiding in its maintenance.³³⁸ As this offense is statutory, and does not depend upon the existence of a state of facts which would be sufficient to constitute a nuisance at common law, it is not indispensable to the indictment that it should conclude with the common law formula "to the common nuisance of all the citizens," etc., if the facts stated bring the case within the statute;³³⁹ but it should conclude "against the form of the statute," etc.

§ 487. Violation of Screen Law.

An indictment for a violation of the "screen law"³⁴⁰ should contain an allegation that the defendant was a licensed liquor-dealer, and should describe the place with certainty. If it alleges that the accused "did then and there place and maintain upon said premises, so used as aforesaid, a certain screen, blind, shutter, curtain, and partition [substituting the conjunctive for the disjunctive as used in the statute] in such a way as to interfere with a view of the business conducted upon said premises, and with a view of the interior of said premises," it is held that it cannot be considered objectionable on the ground of duplicity.³⁴¹

³³⁶ State v. Buck, 78 Me. 193, 3 Atl. Rep. 573.

³³⁷ State v. Brady, 16 R. I. 51, 12 Atl. Rep. 238.

³³⁸ State v. Ruby, 68 Me. 543.

³³⁹ Comm. v. Howe, 13 Gray, 26; State v. Rhodes, 2 Ind. 321.

³⁴⁰ For the substantive law of this offense, see, *supra*, §§ 50, 153.

³⁴¹ Comm. v. Gibbons, 134 Mass. 197. See, also, Comm. v. Keefe, 143 Mass. 467, 9 N. E. Rep. 840.

§ 488. Charging Illegal Transportation of Liquor.

In some of the states, it is a statutory offense to transport intoxicating liquors from place to place within the state, with knowledge or reasonable cause to believe that the same are intended for illegal sale. An indictment for this offense should clearly and distinctly state the places from which and to which the liquor was being conveyed.³⁴² But if it is alleged that defendant "did bring into said city of S. intoxicating liquor, with intent, then and there, in said S., to sell the same himself, in violation of law," this imports, from the terms used, that the defendant was not transporting the liquor through the city to a place beyond, and is sufficient.³⁴³ And so the complaint is sufficient if it charges the illegal transportation to have been from place to place within a particular city.³⁴⁴ Where it is part of the statutory definition of the offense that the liquors should have been transported with an intent to sell them within the state, this intent must be alleged in the indictment, or it will be fatally defective.³⁴⁵ But it need not be alleged that the liquors were not in the original packages in which they were imported.³⁴⁶

§ 489. Violation of Laws against Adulteration.

Under a statute designed to prevent the adulteration of liquor, which provides that all persons, prior to engaging in the sale of liquors, shall take and subscribe an oath not to adulterate their commodities, and also give a bond conditioned for the due observance of this requirement, it is held to be enough for an indictment to allege that the defendant "did then and there unlawfully sell spirituous liquors . . . without then and there having taken and subscribed an oath and given a bond, as required by law of all persons before selling or offering to sell such liquor."³⁴⁷ And if the statute

³⁴² Comm. v. Reily, 9 Gray, 1; State v. Lashus, 79 Me. 541, 11 Atl. Rep. 604.

³⁴³ Comm. v. Keefe, 143 Mass. 467, 9 N. E. Rep. 840.

³⁴⁴ Comm. v. Hutchinson, 6 Allen, 595.

³⁴⁵ State v. Murch, (Me.) 7 Atl. Rep. 115; Comm. v. Intoxicating Liquors, 138 Mass. 506.

³⁴⁶ Comm. v. Waters, 11 Gray, 81.

³⁴⁷ State v. Hays, 38 Mo. 367; State v. Melton, Id. 368.

is so framed that the omission *either* to take the oath or give the bond, constitutes an offense, an indictment is good which alleges a failure of the defendant in either of these respects, though it does not negative a compliance with the other requirement.³⁴⁸ But where the law requires that all liquors "imported into or manufactured in the county" shall be inspected by an authorized official, and makes it penal to sell liquor not so inspected, an indictment thereunder should contain a general allegation that the liquor sold had not been inspected; it is not sufficient to aver simply that it was not inspected in the county where it was sold, for it might have been inspected elsewhere.³⁴⁹

§ 490. Charging Violation of Local Option Law.

In several of the states, the opinion prevails that an indictment for selling liquor in violation of a local option law need not contain a statement of all the formalities necessary to render the law operative, or even an allegation that it was in force in the particular jurisdiction; for such laws, though local, are public, and the courts will take judicial cognizance of them.³⁵⁰ But in other states, it is held that the indictment will not sustain a conviction unless it charges that the local option law was in effect in the county where the crime was committed, as the result of an election held for that purpose. "The fact of the adoption of that law rests upon matters *in pais*, and should be averred and proved as any other material fact is required to be."³⁵¹ Accordingly, the indictment must either allege that the election was held pursuant to the local option law, or state facts and circumstances sufficient to show the same; and an averment that the election was held "in the manner prescribed by law" merely shows that the election was conducted under the general election laws, and is insufficient.³⁵² But if the indictment fails to allege that the election was

³⁴⁸ State v. Crowley, 37 Mo. 369.

³⁴⁹ Woodworth v. State, 4 Ohio St. 487.

³⁵⁰ Jones v. State, 67 Md. 256, 10 Atl. Rep. 216; Savage v. Comm., 84 Va. 582, 5 S. E. Rep. 563; Bogan v. State, 84 Ala. 449, 4 South. Rep. 355.

³⁵¹ Loughridge v. State, (Miss.) 3 South. Rep. 667; Norton v. State, 65 Miss. 297, 3 South. Rep. 665; State v. Chambers, 93 N. Car. 600.

³⁵² Cook v. State, 25 Fla. 698, 6 South. Rep. 451.

held within the time prescribed after notice, such defect will be cured by verdict.³⁵³ Where a portion of a district governed by a local option law is cut off, and united with other territory, receiving a new name, it is not necessary, in an indictment for a violation of the law in the portion of the district not severed, specifically to state that the offense was not committed in that part of the district which was cut off.³⁵⁴ An indictment under the local option law is sufficient if it charges the offense as "contrary to the form of the act of assembly in such case made and provided."³⁵⁵

§ 491. Charging Second Offense.

Where the prosecution is for a second offense against the liquor laws, and a prior conviction for a similar offense becomes material, with a view to the measure of punishment, the indictment should contain such a description of the former conviction as will enable the defendant to find the record.³⁵⁶ If it gives no information of the time, court, or county in which the prior judgment was rendered, it is insufficient.³⁵⁷ So also, if it alleges an impossible date as the time of the prior conviction; though this will not vitiate the indictment as to the new offense charged therein.³⁵⁸ But it is not necessary to set forth particularly the record of the prior conviction, but a brief allegation of the fact, giving the necessary *data*, will be enough.³⁵⁹ In an indictment for a single unlawful sale, an averment of prior conviction is sufficient which alleges that at a specified term of court defendant was convicted of "selling a quantity of intoxicating liquors."³⁶⁰

³⁵³ State v. Houts, 36 Mo. App. 265. See Ninenger v. State, 25 Tex. App. 449, 8 S. W. Rep. 480; Croom v. State, 25 Tex. App. 556, 8 S. W. Rep. 661.

³⁵⁴ Jones v. State, 67 Md. 256, 10 Atl. Rep. 216.

³⁵⁵ Slymer v. State, 62 Md. 237.

³⁵⁶ State v. Small, 64 N. H. 491, 14 Atl. Rep. 727.

(580)

³⁵⁷ State v. Small, 64 N. H. 491, 14 Atl. Rep. 727.

³⁵⁸ State v. Dorr, 82 Me. 341, 19 Atl. Rep. 861.

³⁵⁹ State v. Robinson, 39 Me. 150.

³⁶⁰ State v. Lashus, 79 Me. 504, 11 Atl. Rep. 180; State v. Wyman, 80 Me. 117, 13 Atl. Rep. 47.

CHAPTER XX.

EVIDENCE IN PROSECUTIONS UNDER THE LIQUOR LAWS.

- § 492. Competency of Witnesses.
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- 530. Proof of Illegal Transportation of Liquors.

- § 531. Proof of Illegal Sale to Minor.
- 532. Proof of Sale to Intoxicated Person.
- 533. Proof of Sale to Habitual Drunkard.
- 534. Evidence of Violation of Local Option Law.

§ 492. Competency of Witnesses.

For the most part, the usual rules relating to the competency of witnesses in criminal prosecutions will be found applicable in cases arising under the liquor laws. In several respects the statutes, in various states, have modified the laws of evidence for the purposes of this special class of cases, with a view to facilitating the conviction of offenders, but not in reference to the competency or admissibility of testimony. Thus, the inhabitants of the town wherein the alleged offense of unlicensed liquor-selling was committed are not rendered incompetent as witnesses to sustain the prosecution by the mere fact that the town will be entitled to the penalty recovered.¹ And where one person is indicted for this offense, another, who was to participate in the profits of the business, cannot claim, for that reason, to be exempted from testifying to the commission of the offense.² When husband and wife are indicted for keeping a house where intoxicating liquors are unlawfully sold, and are tried together, the wife, by the force of an enabling statute, may be a witness for her husband, but her testimony cannot be considered in her own behalf.³ If the defendant himself takes the witness-stand, he is to be treated as any other witness, and may be subjected to such cross-examination as would be proper in the case of another witness. Thus, where the accused has testified that he kept only non-intoxicating liquor, except such as he drank himself, he may be cross-examined as to his methods of conducting his business before and after the alleged unlawful sale.⁴ It is also ruled that an unlawful sale of liquor may be proved by other witnesses than the purchaser.⁵ And as the buyer, in a sale made in violation of law, is not guilty of any criminal offense, he cannot be excused from testifying, on the ground that his evidence

¹ State v. Stuart, 23 Me. 111.

² State v. Davis, 23 Me. 403.

³ State v. Donovan, 41 Iowa, 587.

⁴ People v. Hicks, 79 Mich. 457, 44 N.

W. Rep. 931. See, also, Klug v. State.
77 Ga. 734.

⁵ Comm. v. Tinkham, 14 Gray, 12.

would tend to criminate himself.⁶ And if such person shows himself an unwilling witness, his evidence may be elicited by leading questions, as in other cases.⁷

§ 493. Evidence of Spies and Informers.

Prosecutions under the liquor laws are frequently sustained upon the evidence of "spotters" or paid informers. The admissibility of such testimony is not questionable, and its weight and effect are entirely for the jury. The court is not bound to charge that the testimony of such a witness "is to be received with great caution and distrust;" and there is no error in the refusal to so charge, if the jury are properly instructed as to the matters which they may take into consideration in weighing the evidence of the witness.⁸ A proper instruction is, that the jury should consider all the circumstances tending to diminish or fortify the credit of the witness, and decide for themselves what confidence should be placed in him.⁹ Also the following instruction has been held proper by the appellate court: "In considering R.'s testimony, the jury are to have regard to what appears in the evidence, as to the part he had taken in connection with the case. When a witness has by words or acts manifested an intent or feeling adverse to the defendant in any case, or for any cause might be affected by prejudice or bias, the jury should consider and weigh these facts, and make reasonable allowance therefor in considering his testimony."¹⁰ And in a case where the witness was a person employed at a *per diem* compensation to procure illegal sales of liquor for the purpose of prosecuting the sellers, it was held that it was sufficient for the court to charge that the jury "must weigh all the testimony with caution, especially where they see any reason to doubt its truth or discredit it."¹¹

⁶ *Supra*, § 381.

⁷ *Comm. v. Chaney*, 148 Mass. 6, 18 N. E. Rep. 572.

⁸ *Comm. v. Mason*, 135 Mass. 555; *Comm. v. Trainor*, 123 Mass. 414; *State*

v. Hoxsie, 15 R. I. 1, 22 Atl. Rep. 1059.

⁹ *Comm. v. Whitcomb*, 12 Gray, 126.

¹⁰ *Comm. v. Trainor*, 123 Mass. 414.

¹¹ *State v. Hoxsie*, 15 R. I. 1, 22 Atl. Rep. 1059.

§ 494. Circumstantial Evidence.

In a prosecution for a violation of the liquor laws, the offense may be established by circumstantial evidence.¹² "It would be strange indeed," says the learned court in New York, "that a man may be convicted of murder upon circumstantial evidence, and yet the same kind of evidence may not be given when the trial is for selling spirituous liquor without a license."¹³ And even where the defense is supported by the positive testimony of witnesses, there may be circumstantial evidence strong enough to overcome such testimony and to warrant a conviction.¹⁴ Where the statute provides that the delivery of intoxicating liquor from any other place than a dwelling house shall be *prima facie* evidence of a sale, the method of showing a sale thus authorized is not exclusive, and consequently it does not preclude the prosecution from proving the fact of a sale by circumstantial evidence where there is no evidence of a delivery.¹⁵

§ 495. Same; Finding Liquor on Premises.

In some species of prosecutions under the liquor laws,—as, for keeping liquor with intent to sell the same unlawfully, keeping a tenement for the illegal sale of liquor, maintaining a liquor nuisance, and the like,—the finding of liquor on the premises, or the discovery of barrels, kegs, pitchers, decanters, or glasses, either containing liquor or evidently having been recently used for that purpose, is a piece of circumstantial evidence which is proper to go to the jury.¹⁶ And where such evidence has been produced, an instruction that the finding of an article of merchandise in a place where merchandise is

¹² *Comm. v. Maloney*, 16 Gray, 20; *Comm. v. Norton*, *Id.* 30; *Comm. v. Keenan*, 148 Mass. 470, 20 N. E. Rep. 101; *Comm. v. Murphy*, (Mass.) 26 N. E. Rep. 860; *People v. Hulbut*, 4 Denio, 133, 47 Am. Dec. 244; *Vallance v. Everts*, 3 Barb. 553.

¹³ *People v. Hulbut*, 4 Denio, 133, 47 Am. Dec. 244.

¹⁴ *McManigal v. Seaton*, 23 Nebr. 549, 37 N. W. Rep. 271.

¹⁵ *Comm. v. Campbell*, 116 Mass. 32.

¹⁶ *Comm. v. Timothy*, 8 Gray, 480; *Comm. v. Boyden*, 14 Gray, 101; *Comm. v. McCullow*, 140 Mass. 370, 5 N. E. Rep. 165; *State v. Baskins*, (Iowa,) 48 N. W. Rep. 809; *People v. Hicks*, 79 Mich. 457, 44 N. W. Rep. 931.

for sale would tend to show that it was there for sale, is not improper.¹⁷ To illustrate this principle, in a case in Massachusetts, where defendant was charged with unlawfully keeping liquor for sale, he testified that he owned the yard and building in question, that he occupied a portion of the building, that there were three tenants occupying rooms in it, and that the cellar and yard were used by all the tenants. There was evidence that bottles of ale and lager-beer bottles were found in his tenement. It was held that testimony was competent that bottles of ale and beer, bearing the same marks, were found buried in the yard, and that another bottle of ale, marked like the others, and also a pick and shovel, were found in the cellar.¹⁸ So also, evidence of a witness that he saw men sitting and standing in a room in defendant's house, and his wife with bottles of beer under her apron, is competent.¹⁹ And evidence that defendant's shop contained a counter, on which was "a pitcher containing something that looked like ale or beer" and "a pump that looked like a beer-pump," is admissible.²⁰ The testimony of an officer who searched the premises, that a tumbler seized contained liquor, is competent, without producing the liquor, or accounting for its absence.²¹ And proof that decanters, mentioned by the state's witness, contained only colored water, does not render them incompetent evidence upon the question whether the defendant kept intoxicating liquor with intent to sell.²² And such material pieces of evidence are none the less admissible because they were procured by an illegal and unauthorized search of the premises.²³ On a principle exactly similar to that we have been considering, it is held that where the indictment is for unlawful selling, evidence that there were implements and materials for selling liquor in the defendant's shop is competent.²⁴

¹⁷ *Comm. v. Keenan*, 148 Mass. 470, 20 N. E. Rep. 101.

¹⁸ *Comm. v. Finnerty*, 148 Mass. 162, 19 N. E. Rep. 215.

¹⁹ *Comm. v. Gillon*, 148 Mass. 15, 18 N. E. Rep. 584.

²⁰ *Comm. v. Lamere*, 11 Gray, 319.

²¹ *Comm. v. Welch*, 142 Mass. 473, 8 N. E. Rep. 342.

²² *Comm. v. Blood*, 11 Gray, 74.

²³ *State v. Burroughs*, 72 Me. 479.

²⁴ *Comm. v. Lincoln*, 9 Gray, 288.

§ 496. Same; Efforts to Conceal Liquor.

On a trial for maintaining a liquor nuisance, or illegally keeping liquors, it is permissible to show in evidence that the defendant, during a search of his premises, broke certain bottles;²⁵ or that his bar-keeper attempted to pour the liquor down a sink, to prevent the searching officer from finding it;²⁶ or that when the officer entered defendant's house, another person, whose relation to defendant is not shown, took a bottle apparently containing whisky from a table on which was a tumbler, and threw it out of a window, in defendant's presence and without objection from him.²⁷ So also, when it has been proved that defendant was the occupant of one half of a house, and that he and his son were seen in that half just before a search by police officers was begun, evidence that the son was seen a short while after in the other half of the house, throwing beer bottles out of a window, is admissible.²⁸

§ 497. Same; Drunken Men about the Premises.

Evidence of the frequent presence of drunken persons on or near the premises of the defendant is admissible on a prosecution for illegal selling.²⁹ And so also is evidence that persons have been seen to enter the defendant's place sober and afterwards come out intoxicated.³⁰ And evidence of persons being seen to go in and out of the building in a state of intoxication is proper to be submitted to the jury, even though all the witnesses who testify to specific sales state that the liquor sold was not in their opinion intoxicating.³¹ Further, even without evidence of the presence of intoxicated persons, or of their carrying jugs, etc., people may be seen going to and from a place in such numbers, at such times, and under such circumstances, as thereby to furnish evidence proper to be considered, in connection

²⁵ Comm. v. Daily, 133 Mass. 577.

²⁸ Comm. v. Nally, 151 Mass. 63, 23 N.

²⁶ Comm. v. Locke, 145 Mass. 401, 14 E. Rep. 660.

²⁹ Comm. v. Wallace, 143 Mass. 88, 9

N. E. Rep. 621.

N. E. Rep. 5.

²⁷ Comm. v. McHugh, 147 Mass. 401, 18 N. E. Rep. 74.

³⁰ Comm. v. Kennedy, 97 Mass. 224.

³¹ Comm. v. Taylor, 14 Gray, 26.

with other circumstances, as indicating that intoxicating liquors are sold there.³² For example, on a prosecution for keeping a liquor nuisance, there was evidence tending to show that there was a barrel of ale on tap in a shed near defendant's grocery shop, and accessible therefrom; that persons were seen going in that direction as if for a drink, accompanied by the defendant; and that others were seen carrying something away in pails and cans from somewhere near the shed. On this state of the proofs, it was held that there was sufficient evidence to sustain a conviction.³³

§ 498. Weight and Sufficiency of Evidence.

When any proceeding for the punishment of a violation of the liquor laws is distinctively criminal in its character, it is subject to the rule that the guilt of the defendant must be established beyond a reasonable doubt. But where the statute provides that the fine imposed for unlawful selling may be enforced by criminal prosecution or sued for and recovered before a justice, a suit for the fine is not a criminal proceeding, but a civil action, and a recovery is justified by a mere preponderance of evidence.³⁴ Beyond the application of such general principles as this, the question of the weight and sufficiency of the evidence, in prosecutions of this character, depends peculiarly upon the varying facts of individual cases, and hence could not well be discussed in detail in this place. On the general question, however, the decisions collected in the margin will be found to present points of interest and value.³⁵

³² *Comm. v. Finnerty*, 148 Mass. 162, 19 N. E. Rep. 215.

³³ *Comm. v. Kelley*, (Mass.) 25 N. E. Rep. 835.

³⁴ *Proctor v. People*, 24 Ill. App. 599.

³⁵ See *Comm. v. Harvey*, 1 Gray, 487; *Comm. v. Hoyer*, 9 Gray, 292; *Comm. v. Thrasher*, 11 Gray, 57; *Comm. v. Hildreth*, Id. 327; *Comm. v. Dobbryn*, 14 Gray, 44; *Comm. v. Edds*, Id. 406; *Comm. v. Livermore*, 4 Allen, 434;

Comm. v. Powderly, 148 Mass. 457, 19 N. E. Rep. 781; *Comm. v. Clynes*, 150 Mass. 71, 22 N. E. Rep. 436; *Klug v. State*, 77 Ga. 734; *Needham v. State*, 19 Tex. 332; *Sowle v. State*, 21 Ind. 236; *State v. Blair*, 72 Iowa, 591, 34 N. W. Rep. 432; *State v. Jarrett*, 35 Mo. 357; *People v. Cox*, 70 Mich. 247, 38 N. W. Rep. 235; *People v. Hicks*, 79 Mich. 457, 44 N. W. Rep. 931; *People v. Kridler*, 80 Mich. 592, 45 N. W. Rep. 374.

§ 499. Knowledge and Intent.

As a general principle, where a statute makes a given act indictable, proof of a violation of the law is sufficient to warrant a conviction, without proof of a guilty intent. Thus, under a law forbidding the sale of liquor without a license, it is not necessary to prove a criminal intent in order to convict.³⁶ There are cases, however, in which the intention of the defendant becomes an essential element in a statutory misdemeanor and must accordingly be proved. Such is the case in the offense of keeping liquors with intent to sell them unlawfully. Where the defendant is ignorant of the circumstances which make his act unlawful, he cannot of course be charged with a criminal intent. But the availability of such ignorance as a defense, and consequently the necessity of proving knowledge as a means of establishing a guilty mind, is, in many instances, a mooted point. This is the case in regard to sales of liquor to minors and drunkards, made in ignorance of the purchaser's age or habits, where numerous courts hold that there is no legal culpability in the seller, and others hold that he is guilty without proof of knowledge or intent. This point we have already discussed in detail, as the learned reader may see in earlier sections.³⁷

§ 500. Connecting Defendant with Unlawful Acts Shown.

When an act or state of facts, constituting a violation of the liquor laws, has been established by the proof, it will be proper to show the connection of the defendant with the unlawful act or state of facts by inferential or circumstantial evidence. Thus, a conviction for keeping open a tippling-house on Sunday will be sustained by proof that the house was a tippling-house, that it was kept open on Sunday, and that the defendant was the proprietor of it, although he may not have been visible to those resorting to the house for the purpose of tippling.³⁸ And upon a trial for the illegal selling of liquor, where it is

³⁶ *Comm. v. Holstine*, 132 Pa. St. 357,
19 Atl. Rep. 273.

³⁷ *Supra*, §§ 416-418, 426.

³⁸ *Sanders v. State*, 74 Ga. 82. And
see, also, *Johnson v. City of Atlanta*, 79
Ga. 507, 4 S. E. Rep. 673; *Comm. v.*

proved that defendant was in possession of a house where the witnesses drank liquor, and where they left the money therefor on the counter, defendant being in the house at the time, though not in the same room, the jury should not be instructed to acquit, although the witnesses testify that they never bought any liquor from defendant or saw him sell any.³⁹ Where it is necessary to show the ownership or proprietorship of the accused in the house where the illegal sales were made, (or where the liquors were unlawfully kept, or the nuisance maintained, or otherwise as the case may be,) this may be done by putting in evidence his statements, previously made, that he was the owner of the house,⁴⁰ or that he was repairing the house and how much it would cost him;⁴¹ or by proving that, being ostensibly in charge of the house at the time charged, he spoke of it and of its contents as if he were the proprietor.⁴² So also, a sign-board put up in a bar-room occupied by the defendant, with the words "Boarding by J. B. Wilson," the defendant, painted thereon, is presumptive proof, if unexplained, that the defendant is the keeper of the bar-room.⁴³ But where the defendant, in a prosecution for selling without a license, introduces evidence that he was not the proprietor of the place in question, but had leased it to another, evidence that defendant was arrested about a year before for keeping a disorderly house at the place in question is not admissible to prove proprietorship, unless there is also evidence of some probable motive for his making a pretended lease and applying for a license in the name of another.⁴⁴ And so, on the trial of a druggist for selling liquor as a beverage, it is prejudicial error to permit a witness to testify that he saw the alleged purchaser of the liquor afterwards, and on the day on which he bought it, according to his testimony, and that he had whisky which he said he bought of defendant.⁴⁵

Murphy, 147 Mass. 525, 18 N. E. Rep. 403. Compare *Lucker v. Comm.*, 4 Bush, 440.

³⁹ *Neighbors v. Comm.*, (Ky.) 9 S. W. Rep. 718. See *State v. Barron*, 37 Vt. 57.

⁴⁰ *Comm. v. Dearborn*, 109 Mass. 368.

⁴¹ *Comm. v. Hildreth*, 11 Gray, 327.

⁴² *State v. Wambold*, 74 Iowa, 605, 38 N. W. Rep. 429.

⁴³ *State v. Wilson*, 5 R. I. 291.

⁴⁴ *People v. Bradt*, 46 Hun, 445, 10 N. Y. Supp. 157.

⁴⁵ *People v. Hinchman*, 75 Mich. 587, 42 N. W. Rep. 1006.

§ 501. Record of Prior Conviction.

Upon the trial of one charged with having in his possession intoxicating liquors with intent to sell the same in violation of law, the record of his previous conviction for a similar offense is admissible in evidence upon the question of intent.⁴⁶ And so, the record of such prior conviction is competent as a step in the proof that he kept a tenement used for the illegal keeping and sale of liquors, as charged in a subsequent complaint.⁴⁷ But a previous conviction for being a common seller is competent evidence on the issue whether defendant has maintained a liquor nuisance, only when the conviction was based on sales made at the same place.⁴⁸ But if the description of the building in the record of the former case is not inconsistent with that in the pending indictment, though less complete, evidence *aliunde* may be introduced to show that both descriptions refer to the same building.⁴⁹ As to the identity of the respondent with the person named in the record of the prior conviction, that is a question of fact for the jury, and the mere identity of name is not sufficient to authorize the judge to withdraw the question from the jury and treat it as one of law.⁵⁰ In the absence of an extended record, the docket entries are admissible to show a prior conviction, and will be sufficient proof thereof, unless a question of identity is raised.⁵¹ Where the pending prosecution is for a second offense, and defendant's prior conviction is relied on to increase the penalty, such prior conviction is equally conclusive whether his plea, in that case, was guilty, not guilty, or *nolo contendere*. "The decisive thing is not the former plea, but the former judgment."⁵² In Vermont, and probably in other jurisdictions, the proof of a prior conviction must be made before verdict.⁵³

⁴⁶ State v. Neagle, 65 Me. 468.

⁴⁷ Comm. v. Line, 149 Mass. 65, 20 N. E. Rep. 697.

⁴⁸ State v. Hall, 79 Me. 501, 11 Atl. Rep. 181; Comm. v. Austin, 97 Mass. 595.

⁴⁹ State v. Hall, 79 Me. 501, 11 Atl. Rep. 181.

⁵⁰ State v. Lashus, 79 Me. 504, 11 Atl. Rep. 180.

⁵¹ State v. O'Connell, (Me.) 14 Atl. Rep. 291; State v. Robbins, (Me.) 13 Atl. Rep. 584; State v. Lashus, 79 Me. 504, 11 Atl. Rep. 180; State v. Neagle, 65 Me. 468.

⁵² State v. Fagin, 64 N. H. 431, 14 Atl. Rep. 727.

⁵³ State v. Spaulding, 61 Vt. 550, 17 Atl. Rep. 844.

§ 502. Evidence in Case of Joint Parties.

Where parties are jointly indicted, in prosecutions under the liquor laws, the evidence should show their joint participation in the offense charged, or it will fail to warrant a conviction. Thus, where an indictment for retailing liquor charged that A. and B. made the sale to C., and it was proved that A. and B. had each sold liquor by retail to C. at different times at the same bar and in the same house, but no joint sale was shown, nor that either participated in the act of the other, it was held that the indictment was not sustained.⁵⁴ So, where defendant's wife was made a co-defendant, but the only reference in the testimony to her was that, when one witness asked for liquor, defendant said he did not keep it for sale, but his wife had some which she kept for her private use, and that defendant got liquor and handed it to the witness over the counter, it was held that the complaint should be dismissed as to the wife.⁵⁵

§ 503. Proving Sale of Liquor.

In a prosecution for an unlawful sale of intoxicating liquor, it is not always necessary that each separate element of a contract of sale should be distinctly and affirmatively proved. The law, for instance, implies a sale from the fact that, in a saloon, liquor was set before and drunk by a person calling for it.⁵⁶ Consequently, if a man goes into a dram-shop, calls for a quantity of a specified liquor, and the same is drawn and delivered to him by the keeper of the shop, this is evidence of a sale proper to go to a jury, although there is no proof that any money was paid or that directions were given to charge the purchase.⁵⁷ So also, it is sufficient to sustain a verdict of guilty, if the evidence shows that a person put down money in the defendant's presence, and carried away a bottle of liquor with-

⁵⁴Farrell v. State, 3 Ind. 573.

⁵⁵State v. Matheison, 77 Iowa, 485, 42 N. W. Rep. 377.

⁵⁶Auburn Excise Comm'rs v. Merchant, 34 Hun, 19.

⁵⁷Hill v. State, 37 Ark. 395; State v. Simons, 17 N. H. 83.

out objection.⁵⁸ The fact of a sale may also be established by circumstantial evidence. Thus, a conviction for selling liquor on Sunday is sustained by evidence that one C. was seen to enter the defendant's bar-room on that day, and to come out in ten or fifteen minutes with a bottle full of whisky in his pocket, two hours after which the accused was found in the bar-room, especially when coupled with proof of an extreme anxiety on the part of the defendant to keep C. out of the way at the time of the trial.⁵⁹ So it is competent to show that an order was sent by the purchaser, by telephone, to the establishment of which the defendant was in charge, and that the liquor was accordingly sent to the purchaser.⁶⁰ And the books of an express company are competent evidence to show the shipment and delivery of goods to the buyer.⁶¹ As in other cases, the confessions or admissions of the defendant are also proper evidence. Thus, his admission, in a stipulation wherein he attempts to justify under a revoked license, that he sold the liquor as charged, is sufficient evidence to warrant a conviction.⁶² The personality of the purchaser, if described in the indictment, should be proved as laid. To illustrate,—a sale to a person acting as agent for an undisclosed principal may be charged as a sale to the agent, and consequently proof given, at the trial, of his acting as such agent will not constitute a variance. But evidence of a sale to an agent, with notice that he was purchasing for his principal, will not support an allegation, in the indictment, of a sale to the agent.⁶³ If a single offense is charged in the indictment, with particular description of time, place, and other circumstances, a single specific instance of unlawfully selling must be suf-

⁵⁸ McClure v. State, 43 Ark. 75; Liles v. State, Id. 95. But an indictment for selling without license is not supported by proof merely that liquor was drunk on defendant's premises by his invitation. State v. Quinn, 25 Mo. App. 102. See, also, State v. Spaulding, 61 Vt. 505, 17 Atl. Rep. 844. And in a prosecution for the sale of whisky on Sunday, where the witness was so drunk at the time of the alleged offense as to be unable to testify whether the whisky was sold or given to him, or whether or

not he paid for it, it was held that the evidence was not sufficient to sustain a conviction. Keller v. State, 23 Tex. App. 259, 4 S. W. Rep. 886.

⁵⁹ Comm. v. Stevens, (Mass.) 26 N. E. Rep. 96.

⁶⁰ State v. Priester, 43 Minn. 373, 45 N. W. Rep. 712.

⁶¹ State v. Kriechbaum, (Iowa,) 47 N. W. Rep. 872.

⁶² Neuman v. State, 76 Wis. 112, 45 N. W. Rep. 30.

⁶³ Comm. v. Remby, 2 Gray, 508.

ficiently established by the evidence. And if the proof tends to show several sales made by defendant at different times, the jury should be instructed that they must find him guilty of making some one specific sale, in order to convict.⁶⁴ Upon an indictment charging an unlawful sale, a conviction cannot be had upon evidence tending to prove another and distinct offense not included in the act of selling. Thus, where suffering liquor to be drunk on the premises is a distinct offense from that of selling, evidence of the one will not support a conviction on an indictment charging the other.⁶⁵ But where the statute prohibits the selling, giving away, or furnishing liquor, in such terms that an indictment under it may allege all these acts conjunctively, without duplicity, then, although the evidence may not clearly make out a sale, it does not follow that the defendant must be acquitted; for if it tends to establish either a sale or a furnishing, it must go to the jury.⁶⁶ And when a person authorized to sell liquor for certain purposes is indicted for selling for other purposes, the charge is not sustained by evidence that he exercised his privilege improperly, or that he made sales for the permitted purposes in an irregular manner.⁶⁷ Finally, it is to be observed that the fact that on certain occasions the defendant refused to sell intoxicating liquor to persons who wished to buy it has no tendency to contradict or control evidence that at other times he had made such sales, and is not relevant to the issue of his having made the unlawful sales charged.⁶⁸

§ 504. Allegation of Sale and Proof of Gift.

It is generally held that when the statute makes the *selling* of intoxicating liquors, under certain circumstances or to certain persons, a separate and distinct offense from the *giving* of liquors under the same conditions, proof of one of these acts will not sustain a charge of the other.⁶⁹ And on an indictment for the unlawful sale

⁶⁴ *Boldt v. State*, 72 Wis. 7, 38 N. W. Rep. 177. Compare *Comm. v. Leo*, 12 Gray, 33.

⁶⁵ *State v. Apperger*, 80 Mo. 173.

⁶⁶ *State v. Hassett*, (Vt.) 23 Atl. Rep. 584.

⁶⁷ *State v. White*, 31 Kans. 342, 2 Pac. Rep. 598.

⁶⁸ *Comm. v. Barlow*, 97 Mass. 597; *Comm. v. Bickum*, (Mass.) 26 N. E. Rep. 1003; *Corley v. State*, (Ga.) 13 S. E. Rep. 556; *Barnes v. State*, 20 Conn. 254.

⁶⁹ *Wlecké v. People*, 14 Ill. App. 447;

of liquor, an instruction which fails to distinguish between sales and gifts of liquor is erroneous.⁷⁰ Nevertheless, in some of the states, a contrary view appears to obtain, and it is considered that a charge of selling may be sustained by evidence of giving, or *vice versa*.⁷¹ And in a case in Indiana, where the indictment alleged a sale of liquor, and the proof did not show that money was paid, it was held that, as a gift would have been equally a violation of the law, a sale would be presumed.⁷² But where the statute does not prohibit the giving away of liquor, but only its sale, the case is free from any doubt; a conviction cannot be had unless a sale is proved.⁷³

§ 505. Evidence of Sales Other than Those Counted on.

As a general principle, it is erroneous to admit evidence of a greater number of offenses than there are counts in the indictment; and hence, when an indictment for the unlawful selling of liquor contains but a single count, the prosecution should not be allowed to go to the jury upon evidence of more than one transaction, and if evidence of several sales has been introduced, the state should be required to elect.⁷⁴ And when the proceeding is by information, and the prosecuting attorney files therewith a statement of evidence taken by him, relating to sales made by the accused, and no other specification of sales to be given in evidence is filed, the state should be confined to proving the sales specified in the statement.⁷⁵ When, therefore, on an indictment for illegal selling, the prosecution has

Humpeler v. People, 92 Ill. 400; New Decatur v. Laude, (Ala.) 9 South. Rep. 382; Wood v. Territory, 1 Oreg. 223. See, *supra*, § 406.

⁷⁰ Birr v. People, 113 Ill. 645.

⁷¹ Dahmer v. State, 56 Miss. 787; Dant v. State, 106 Ind. 79, 5 N. E. Rep. 870.

⁷² Dant v. State, 106 Ind. 79, 5 N. E. Rep. 870.

⁷³ Keller v. State, 23 Tex. App. 259, 4 S. W. Rep. 886.

⁷⁴ Hodgman v. People, 4 Denio, 235; Stockwell v. State, 27 Ohio St. 563; Stone v. State, (Miss.) 7 South. Rep. 500; State v. Fierline, 19 Mo. 380; State v. Miller, 24 Conn. 522. But in Ver-

mont, upon the trial of an indictment in several counts, for violations of the license law by selling liquor, it is held to be no error in the court to permit the prosecutor, after having given evidence tending to prove as many distinct breaches of the law by the respondent, within the time covered by the indictment, as there are counts in the indictment, to proceed and prove other sales within the same period of time. State v. Smith, 22 Vt. 74; State v. Croteau, 23 Vt. 14, 54 Am. Dec. 90.

⁷⁵ State v. Lawson, (Kans.) 25 Pac. Rep. 864.

proved one unlawful sale, it is error to admit evidence of other sales, unless they all constitute one transaction, or the further evidence is necessary to identify the offender or to prove motive or *scienter*, or unless the whole series must be proved to make out the offense.⁷⁶ But evidence of other sales than that counted on, made on similar occasions, is admissible on the question of intent.⁷⁷ And so where defendant's conviction is sought on an unlicensed sale, made by his wife in his presence and with his knowledge, evidence of similar sales made by her in his presence (although not proof to convict him) is admissible to illustrate the character of the sale in the particular case, and to show that it was made by his authority.⁷⁸ So again, where it is claimed that the liquor alleged to have been sold was not intoxicating, it is then competent to give evidence of other sales, in order to show the purposes for which the liquor was sold and purchased.⁷⁹ And where the particular sale is charged to have been made for purposes other than those allowed by defendant's permit, evidence of other sales to the same purchaser is competent to show that he did not buy for the excepted purposes, and that this was known to the accused.⁸⁰ It is further to be remarked that the state is not restricted, in its evidence, to proof of sales which were testified to before the grand jury.⁸¹ And so, where the proceeding is by information, which is verified by both the prosecuting attorney and the prosecuting witness, it is not error to permit evidence to be introduced on the trial showing sales of liquor other than those of which the prosecuting witness had knowledge.⁸²

§ 506. Evidence of Selling without License.

In a jury trial for a violation of a municipal ordinance imposing a license tax on liquor-sellers, evidence of the population of the city

⁷⁶ King v. State, 66 Miss. 502, 6 South. Rep. 188. Where it is apparent that the indictment refers to a sale testified to by a witness for the state, it is error to ask defendant, on his cross-examination, as to a different transaction with respect to liquor. Bailey v. State, 67 Miss. 333, 7 South. Rep. 348.

⁷⁷ Comm. v. Sinclair, 138 Mass. 493.

⁷⁸ Hensly v. State, 52 Ala. 10.

⁷⁹ State v. Coulter, 40 Kans. 87, 19 Pac. Rep. 368.

⁸⁰ State v. Elliott, (Kans.) 26 Pac. Rep. 55.

⁸¹ Comm. v. Phelps, 11 Gray, 73.

⁸² State v. Reno, 41 Kans. 674, 21 Pac.

and county, and the annual sales of liquor and the profits thereof, is properly rejected; because the reasonableness of the ordinance, if questioned, is for the court.⁸³ An indictment for selling liquor without a license is supported by proof of such a sale on Sunday, although another provision of the statute makes it indictable to sell on Sunday with or without a license.⁸⁴ When the prosecution is for retailing liquors without having paid the occupation tax therefor, it is error to exclude the sheriff's receipt for the tax, offered in evidence by the defendant to prove that he had paid the tax.⁸⁵

§ 507. Burden of Proving License.

In the state of Kansas, it is held that where a defendant is prosecuted for selling intoxicating liquor without a license, the burden of proving a want of license is upon the prosecution.⁸⁶ And in Wisconsin, the doctrine is that, in such a prosecution, the state must produce some presumptive evidence that the defendant had no license,—as, by showing the absence of an entry in the record of licenses required by law to be kept by the town clerk,—before he can be called on to prove the contrary.⁸⁷ But these decisions are exceptional. The rule established by the vast preponderance of authority is that, in cases where a license to sell, if produced and relied on, would constitute a complete defense to the action, the prosecution is not bound to produce any evidence in support of the negative allegation that the sale was made without license, but on the contrary, the defendant must assume the burden of proving that he was duly licensed.⁸⁸

Rep. 803. And see *People v. Henschel*, (Sup.) 12 N. Y. Supp. 46.

⁸³ *Elk Point v. Vaughn*, 1 Dak. 113, 46 N. W. Rep. 577.

⁸⁴ *People v. Krank*, 110 N. Y. 488, 18 N. E. Rep. 242; *Comm. v. Harrison*, 11 Gray, 310.

⁸⁵ *Curry v. State*, 35 Tex. 364; *State v. Terry*, Id. 366.

⁸⁶ *State v. Kuhuke*, 26 Kans. 405; *State v. Nye*, 32 Kans. 201, 204, 4 Pac. Rep. 134, 136.

⁸⁷ *Mehan v. State*, 7 Wis. 670; *Hepler v. State*, 58 Wis. 46, 16 N. W. Rep. 42.

There was also an early ruling to the same effect in Massachusetts, (*Comm. v. Thurlow*, 24 Pick. 374,) but it is inconsistent with the later decisions in that state.

⁸⁸ *United States v. Nelson*, 29 Fed. Rep. 202; *State v. Crowell*, 25 Me. 171; *State v. Woodward*, 34 Me. 293; *State v. Simons*, 17 N. H. 83; *State v. Foster*, 23 N. H. 343, 55 Am. Dec. 191; *State v. McGlynn*, 34 N. H. 422; *State v. Shaw*, 35 N. H. 217; *State v. Nulty*, 57 Vt. 543; *Comm. v. Tuttle*, 12 Cush. 502; *Comm. v. Lahy*, 8 Gray, 459; *Comm. v. Ryan*,

Various reasons have at different times been advanced in support of this rule. Thus, Dr. Bishop thinks that a *prima facie* case is made out for the prosecution, without evidence on this point, by the presumption that the defendant belongs to the general mass of people, who are unlicensed, rather than to the exceptional class of license-holders, and that, as there was certainly a time when he was not licensed, the presumption of continuance applies, which presumptions the rule requires him to overcome by proof.⁸⁹ But we believe the rule is sufficiently justified by considerations of convenience and reasonableness. It is a general and well-settled principle that "where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any person except those who are duly licensed therefor; as, for selling liquors, exercising a trade or profession, or the like. Here the party, if licensed, can immediately show it without the least inconvenience, whereas, if proof of the negative were required, the inconvenience would be very great."⁹⁰ Another view advanced by the court in Georgia, is that a plea of "not guilty," to a charge of selling without license, amounts to an allegation of selling with license, and the rule applies that he who alleges

9 Gray, 137; *Comm. v. Carpenter*, 100 Mass. 204; *Comm. v. Shea*, 115 Mass. 102; *Comm. v. Curran*, 119 Mass. 206; *Comm. v. Rafferty*, 133 Mass. 574; *Potter v. Deyo*, 19 Wend. 361; *People v. Jefferson*, (N. Y. App.) 3 N. E. Rep. 797; *State v. Passaic*, 42 N. J. Law, 87; *State v. Camden*, 48 N. J. Law, 89, 2 Atl. Rep. 668; *Geuing v. State*, 1 McCord, 573; *State v. Morrison*, 3 Dev. L. 299; *State v. Emery*, 98 N. Car. 668, 3 S. E. Rep. 636; *State v. Sorrell*, 98 N. Car. 738, 4 S. E. Rep. 630; *Sharp v. State*, 17 Ga. 290; *Easterling v. State*, 35 Miss. 210; *Thomas v. State*, 37 Miss. 353; *Pond v. State*, 47 Miss. 39; *Fairly v. State*, 63 Miss. 333; *Haskill*

v. Comm., 3 B. Mon. 342; *Williams v. State*, 35 Ark. 430; *Flower v. State*, 39 Ark. 209; *Shearer v. State*, 7 Blackf. 99; *Noecker v. People*, 91 Ill. 468; *Schmidt v. State*, 14 Mo. 137; *State v. Lipscomb*, 52 Mo. 32; *State v. Edwards*, 60 Mo. 490; *State v. McNeary*, 14 Mo. App. 410; *Smith v. Adrian*, 1 Mich. 495; *State v. Schmail*, 25 Minn. 370; *State v. Bach*, 36 Minn. 234, 30 N. W. Rep. 764; *State v. Cutting*, 3 Oreg. 260.

⁸⁹ Bishop, Stat. Crimes, § 1051.

⁹⁰ 1 Greenl. Ev. § 79; *Roscoe*, Crim. Ev. (2d Edn.) 72; *Starkie*, Ev. 589; *State v. Foster*, 23 N. H. 348, 55 Am. Dec. 191; *State v. Lipscomb*, 52 Mo. 32.

affirmative must prove it, especially if it is peculiarly within his knowledge.⁹¹

The rule just stated, throwing the burden of showing a license on the defendant, applies as well to an agent or bar-keeper, justifying under his principal's license, as to the proprietor himself.⁹² And, if the local option law intervenes, the prosecution is not required to show that the question of license or no license was submitted to the people at the preceding election, as provided by law.⁹³ In Massachusetts, a statute enacts that in all prosecutions for selling spirituous liquors without license, the burden of proving a license shall be on the defendant. This, it is held, obliges any person prosecuted as a common seller to prove any authority on which he relies in his defense; but it does not apply to an indictment for a nuisance by keeping a building used for the unlawful sale and keeping of liquors.⁹⁴ But if the holding of a license, instead of being a defense to the action, is a constituent element of the offense, so that the averment in regard to license is affirmative rather than negative, then it devolves upon the prosecution to show that the defendant was licensed. Thus, where an ordinance enacts that "no person shall keep open any saloon or place *licensed under this ordinance* . . . on Sunday," it is necessary, in order to secure a conviction for a violation of the ordinance, to prove that the defendant was a licensed saloon-keeper.⁹⁵ It has also been ruled that, on the trial of one charged with aiding and abetting another in the unlawful sale of intoxicating liquor, the burden is on the state to prove that the latter did not have a license to sell such liquor.⁹⁶

§ 508. Evidence on Question of License.

When the defendant undertakes to prove that he was duly licensed, as a defense to the prosecution, the best evidence on this point is of

⁹¹ Sharp v. State, 17 Ga. 290.

⁹² State v. McNeary, 14 Mo. App. 410.

⁹³ Smith v. Adrian, 1 Mich. 495.

⁹⁴ Comm. v. Lahy, 8 Gray, 459; Comm. v. Leo, 110 Mass. 414.

⁹⁵ Bloomington v. Strehle, 47 Ill. 72. See, also, State v. Whitter, 18 W. Va. 306.

⁹⁶ Berning v. State, 51 Ark. 550, 11 S. W. Rep. 882.

course the license itself. The production of a license in proper form is a complete defense and precludes all further inquiry. As it is not collaterally impeachable, the finding of the licensing authorities, that defendant's petition and the other preliminary steps were regular and sufficient, is conclusive on the state.⁹⁷ But the license or authority relied on must be co-extensive with the offense charged. Thus, proof that the defendant, during a *part* of the time embraced in an indictment for being a common seller of intoxicating liquors, was authorized to sell, is not an answer to the whole indictment.⁹⁸ And a license which does not give the defendant the privilege of selling the particular liquors alleged to have been sold, or which does not authorize a sale for the purposes or under the circumstances charged, is no answer to the prosecution.⁹⁹ If the prosecution undertakes to prove that the defendant was licensed, the evidence for this purpose may be drawn from the records of the court or board empowered to grant licenses, or from their minutes, if no extended record is kept.¹⁰⁰ It may also be shown by the admissions of the defendant. Thus, where the accused, when asked by a police officer whether he was the licensed owner of a certain liquor shop, answered that he was, it was held that the jury might infer ownership and a license to sell liquors.¹⁰¹

When the point to be proved is that the defendant was *not* licensed, the want of a license may be shown by the testimony of the officers charged with the duty of issuing licenses, or by the absence of any entry as to defendant in their records. Thus, in Kansas, where permits to sell liquor are issued by the probate judge, his testimony that he kept the records of permits, that the record showed none to have been issued to defendant, and that he never issued any such permit, is *prima facie* proof that the defendant had no authority to sell.¹⁰² So, when licenses are issued by a court, as such, the testimony of the

⁹⁷ State v. Evans, 83 Mo. 319.

⁹⁸ Comm. v. Putnam, 4 Gray, 16.

⁹⁹ Comm. v. Thayer, 8 Metc. (Mass.) 525. See Huffstater v. State, 5 Hun, 28.

¹⁰⁰ Comm. v. Bolkom, 3 Pick. 281; State v. Peterson, 38 Minn. 143, 36 N.

W. Rep. 443; State v. Sannerud, 38 Minn. 229, 36 N. W. Rep. 447.

¹⁰¹ Comm. v. Cameron, 141 Mass. 83, 6 N. E. Rep. 547.

¹⁰² State v. Schmidt, 34 Kans. 399, 8 Pac. Rep. 867; State v. Schweiter, 27 Kans. 499.

clerk is admissible to show that no license had been issued to defendant; and in the absence of any law requiring a record to be kept in such court of licenses issued, the testimony of such officer is the best and highest evidence of the fact.¹⁰³ So, in Massachusetts, the record of the town or city clerk, containing the names of persons licensed, is sufficient evidence to show that defendant is not licensed.¹⁰⁴ Where the prerequisite condition to the right to sell takes the form of payment of a tax, the best evidence of its non-payment is the testimony of the officer who is directed by law to collect it.¹⁰⁵ The want of a license or authority may also be shown by the admissions of the defendant. Thus, where he stated, when the process was served, that the city charged too much for licenses, and he could not afford to pay the price, and before the police court he pleaded guilty of violating the licensing ordinance, this was held sufficient proof that he had no license.¹⁰⁶

§ 509. United States License as Evidence.

When the prosecution is for such offenses as being a "common seller" of liquors, keeping liquors for unlawful sale, maintaining a nuisance, or engaging in the business of liquor selling without proper authority, the fact that defendant has paid the special tax as a retail liquor-dealer, under the laws of the United States, is admissible in evidence for the purpose of showing what his business is, or that he keeps liquor for sale, or, generally, on the question of intent.¹⁰⁷ This fact may be proved by the book containing a record of the names of persons paying special taxes, kept at the office of the collector of internal revenue as required by the federal statute;¹⁰⁸ or by an examined copy of the record of special taxes kept by the collector, when sustained by the oath of a person (not necessarily a person connected

¹⁰³ *Elkins v. State*, 13 Ga. 495. And see *Mayson v. City of Atlanta*, 77 Ga. 662.

¹⁰⁴ *Comm. v. Tuttle*, 12 Cush. 502; *Comm. v. Foss*, 14 Gray, 50; *Briggs v. Rafferty*, Id. 525.

¹⁰⁵ *People v. Paquin*, 74 Mich. 34, 41 N. W. Rep. 852.

¹⁰⁶ *Pendergast v. Peru*, 20 Ill. 51.

¹⁰⁷ *Comm. v. Brown*, 124 Mass. 318; *State v. Mellor*, 13 R. I. 666; *State v. Teahan*, 50 Conn. 92; *State v. Intoxicating Liquors*, 44 Vt. 208; *Comm. v. Keenan*, 11 Allen, 262. Compare *State v. Stutz*, 20 Iowa, 488.

¹⁰⁸ *State v. Gorham*, 65 Me. 270.

with the office) who has compared it with the record;¹⁰⁹ or by a written return made by the defendant to the collector, declaring an intention to carry on the business of a retail liquor-dealer for the ensuing year, with evidence of the payment of the tax;¹¹⁰ or by the testimony of a witness that he saw, hanging on the wall of defendant's bar-room, a paper purporting to be a license from the United States authorizing the defendant to sell liquor.¹¹¹ In Massachusetts, the fact that a person keeps posted on his premises a United States tax receipt as a dealer in liquors, and in Maine, the fact of his payment of the federal tax on liquor-sellers, is made, by statute, *prima facie* evidence that such person is engaged in the business of selling liquor.¹¹² These statutes, it is said, are merely declaratory of the common law, and are valid.¹¹³ But they do not raise a conclusive presumption against the defendant. It is error to instruct the jury that they must find him guilty on proof of such facts alone; for such evidence is competent and sufficient to justify a verdict of guilty only if the jury are satisfied of defendant's guilt beyond a reasonable doubt.¹¹⁴ When it has been shown in evidence that the defendant took out an internal revenue license to sell liquor, it is competent for him, in rebuttal, to prove what passed between the assessor and himself, to show the purpose for which the license was taken out.¹¹⁵

§ 510. Evidence of Sale by Servant or Agent.

An indictment or complaint alleging an unlawful sale of liquor by the defendant is supported by proof that he sold it by his clerk, servant, or agent.¹¹⁶ But when it has been shown that the sale was made by the hand of a servant or agent, it then becomes necessary to prove

¹⁰⁹ State v. O'Connell, 82 Me. 30, 19 Atl. Rep. 86; State v. Wiggin, 72 Me. 425; State v. Spaulding, 60 Vt. 228, 14 Atl. Rep. 769. And testimony as to the meaning of the letters "R. L. D.," (retail liquor-dealer,) in such record, is admissible, if the witness has such special knowledge as will enable him to testify in relation thereto. State v. O'Connell, *supra*.

¹¹⁰ State v. Teahan, 50 Conn. 92.

¹¹¹ Comm. v. Brown, 124 Mass. 318.

¹¹² Acts Mass. 1887, c. 414; Pub. Laws Me. 1887, c. 140.

¹¹³ Comm. v. Uhrig, 146 Mass. 132, 15 N. E. Rep. 156.

¹¹⁴ State v. Liquors and Vessels, 80 Me. 57, 12 Atl. Rep. 794; State v. O'Connell, 82 Me. 30, 19 Atl. Rep. 86.

¹¹⁵ Comm. v. Austin, 97 Mass. 595.

¹¹⁶ Comm. v. Park, 1 Gray, 553; Parker v. State, 4 Ohio St. 563.

that it was made in the presence of the principal, or with his knowledge and assent, or by his direction or authority.¹¹⁷ Evidence that the sale charged was made in defendant's bar-room or saloon, by a bar-keeper or person apparently in charge there, is *prima facie* evidence of the knowledge and consent of the owner.¹¹⁸ And defendant's admission of proprietorship and of having a license, and testimony that he kept the place, are evidence that sales made there were made by him or by his authority.¹¹⁹ So also, proof of sales by the master is admissible, as tending to show that the sale by the servant was with the assent and by the authority of the master.¹²⁰ And evidence that liquors were kept on the premises for sale during a time prior to that specified in the indictment, and that the clerk, during the same time, had made sales to other persons, is relevant to the issue.¹²¹ Where the proof shows that the sale was made by defendant's wife at their dwelling, it is competent to prove that defendant had previously kept liquors for sale at that place, and that at the time of the sale alleged in the indictment he was engaged at the same place in the business of selling liquors, as tending to show the agency and authority of the wife to make the sale in question.¹²² There is a presumption that a wife who, on her husband's premises and in his presence and with his knowledge, makes illegal sales of liquor, does so as his agent. But this presumption does not attach to such sales so made by a woman living with a man as his concubine, and in such a case it must be shown by evidence that she acted as his agent in making the sale complained of.¹²³ In Massachusetts, it is held that evidence of sales of liquor on the premises in the absence of the defendant by other persons is admissible, without other evidence that

¹¹⁷ See *Comm. v. Gillon*, 2 Allen, 505; *Comm. v. Williams*, 4 Allen, 587; *Comm. v. Lafayette*, 148 Mass. 130, 19 N. E. Rep. 26; *Comm. v. Brooks*, 150 Mass. 59, 22 N. E. Rep. 436; *Comm. v. Keenan*, (Mass.) 25 N. E. Rep. 32; *State v. Bonney*, 30 N. H. 206; *Hall v. McKechnie*, 22 Barb. 244; *Perkins v. State*, (Ala.) 9 South. Rep. 536; *State v. Beloit*, 74 Wis. 267, 42 N. W. Rep. 110.

¹¹⁸ *Kirkwood v. Autenreith*, 11 Mo.

App. 515; *Amerman v. Kall*, 34 Hun, 126.

¹¹⁹ *Comm. v. Chadwick*, 142 Mass. 595, 8 N. E. Rep. 589.

¹²⁰ *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688.

¹²¹ *State v. Shaw*, 58 N. H. 78.

¹²² *State v. Colby*, 55 N. H. 72; *State v. Roberts*, Id. 483.

¹²³ *United States v. Bonham*, 31 Fed. Rep. 808.

they were his agents except that tending to show that he kept the tenement.¹²⁴ And in Indiana, a conviction has been sustained on evidence that a man went to defendant's saloon on Sunday through his hotel, and, on calling for beer, defendant not being present, was told by a boarder to help himself from a certain bottle, which he did, leaving the price of a drink on the counter.¹²⁵ On a trial for selling liquor without a license, the presumption is that the vendor is the owner of the liquor sold,¹²⁶ and when the sale was made by the accused in person, the ownership of the liquor is immaterial, unless he justifies under a license to the owner.¹²⁷ But where the prohibition of the statute applies only to licensed dealers, the allegation of the indictment that the accused is a "dealer" is an essential affirmative allegation and must be proved, and evidence that the accused was merely a clerk in the saloon will not sustain such allegation.¹²⁸ Evidence that a clerk's employer had forbidden him to sell intoxicating liquors in his shop is not competent evidence in favor of the clerk when charged with such sales.¹²⁹ But a conviction cannot be had where the only act of the defendant appears from the evidence to have been done as the agent or assisting friend of the person for whom the liquor was procured, and the defendant was not interested in the liquor, the sale, or the money paid for it.¹³⁰

§ 511. Burden of Proving Legality of Sale.

When a sale of intoxicating liquor has been shown as charged, if the defendant claims that the sale was not unlawful, because coming within the terms of an exception or proviso in the statute, or because made for specially permitted purposes, or under other circumstances which would relieve him from criminal responsibility, the burden is on him to establish this defense by proof.¹³¹ For example, when it

¹²⁴ *Comm. v. Edds*, 14 Gray, 406.

¹²⁵ *Pierce v. State*, 109 Ind. 535, 10 N. E. Rep. 802.

¹²⁶ *Rana v. State*, 51 Ark. 481, 11 S. W. Rep. 692.

¹²⁷ *Evans v. State*, (Ark.) 15 S. W. Rep. 360.

¹²⁸ *Archer v. State*, 10 Tex. App. 482.

¹²⁹ *Comm. v. Tinkham*, 14 Gray, 12.

¹³⁰ *Morgan v. State*, 81 Ala. 72, 1 South. Rep. 472.

¹³¹ *State v. Cloughly*, 73 Iowa, 626, 35 N. W. Rep. 652; *Shear v. Green*, 73 Iowa, 688, 36 N. W. Rep. 642; *State v. Guisenhouse*, 20 Iowa, 227; *State v. Becker*, Id. 438; *State v. Baughman*, Id.

is proved that a druggist has sold liquor without a license, the burden of proof is on him to show that the sale was made in good faith for medical purposes.¹³² And where there is evidence tending to show that the liquor was purchased for medicinal use, but none that it was sold for that purpose, a conviction is proper.¹³³ So, when a person claims the right to sell liquors as being the importer, the burden is upon him to prove himself to be such.¹³⁴ And the fact that defendant was acting as the agent of an importer, in making the sale charged, is likewise a matter of defense, and the burden is upon him to prove it by evidence sufficient to throw a reasonable doubt upon the case made by the prosecution.¹³⁵ So, on the trial of an indictment for maintaining a liquor nuisance, the burden is on the defendant to show that the wine sold was made from fruits grown in the state, if that is his defense.¹³⁶ And on the same principle, on an indictment for selling liquor without filing the oath and bond against adulteration, as required by the statute, where the evidence shows a sale, the burden is on the defendant to show that he had complied with the statute.¹³⁷

§ 512. Evidence as to Time of Offense.

Where time is not of the essence of the offense, it need not be proved strictly as laid. But there are limits, in every case, within which the evidence must be confined, in respect to time, in order to warrant a conviction. Thus, if the law or ordinance under which the prosecution is brought is of comparatively recent adoption, or has been repealed and re-enacted, or suspended and revived, it must be made clearly to appear that the alleged offense was committed at a time when it was in force.¹³⁸ Again, it must be shown that the acts charged were done within the period of limitations, and evidence of

497; *Gunnarssohn v. Sterling*, 92 Ill. 569.

¹³² *Miles v. State*, 5 W. Va. 524; *State v. Emery*, 98 N. Car. 768, 3 S. E. Rep. 810; *Howard v. State*, 5 Ind. 516.

¹³³ *Leppert v. State*, 7 Ind. 300.

¹³⁴ *State v. Robinson*, 49 Me. 285.

¹³⁵ *Comm. v. Zelt*, 138 Pa. St. 615, 21 Atl. Rep. 7.

¹³⁶ *State v. Miller*, 53 Iowa, 84, 4 N. W. Rep. 838.

¹³⁷ *State v. Finn*, 38 Mo. App. 504. See *Cheadle v. State*, 4 Ohio St. 477.

¹³⁸ *Bennett v. People*, 16 Ill. 160; *Newlan v. Aurora*, 14 Ill. 864.

transactions which took place before that time is not competent.¹³⁹ And in view of this rule, in a case where the only evidence as to time was that the defendant sold liquor on January 4th, with no mention of the year, it was held to be insufficient.¹⁴⁰ The evidence must also be confined to acts done before the finding of the indictment. Hence, where the witnesses testify that the defendant sold them liquor, but they cannot say positively whether it was before or after the date of filing the information or finding the indictment, the evidence will not sustain a verdict of guilty.¹⁴¹ It is not always necessary, however, that the time proved should be co-extensive with the time laid in the indictment. Thus, proof that the defendant maintained a building for the illegal sale of liquors a single day will support an indictment for maintaining the same during a year.¹⁴²

§ 513. Same; Single Unlawful Sale.

Where the prosecution is for a single act of unlawful liquor-selling, so that time is not of the essence of the offense, the time need not be proved strictly as charged, but it will be sufficient to show that the act was done at any time before the date of the indictment and within the period of limitation, although at a different day or time from that alleged.¹⁴³ Thus, in Massachusetts, it is said that an indictment for an unlawful sale of liquor on a particular day is sustained by testimony of the alleged purchaser that he was frequently at the defendant's place and has no doubt that he sold him liquor during the month named, although the witness cannot recollect any particular sale, or distinguish any one sale during the month from any other.¹⁴⁴ So where the state elects to rely on a sale to a certain per-

¹³⁹ *State v. Cofren*, 48 Me. 364.

¹⁴⁰ *State v. Tissing*, 74 Mo. 72.

¹⁴¹ *State v. Reick*, 48 Kans. 279, 23 Pac. Rep. 577; *Patton v. State*, 80 Ga. 714, 6 S. E. Rep. 273.

¹⁴² *Comm. v. Higgins*, 16 Gray, 19.

¹⁴³ *United States v. Burch*, 1 Cranch C. C. 36; *Virginia v. Smith*, Id. 46; *Comm. v. Kelly*, 10 Cush. 69; *Comm. v. Dillane*, 1 Gray, 488; *Comm. v. Leonard*, 9 Gray, 285; *Comm. v. Dillane*, 11 Gray,

67; *Comm. v. Maloney*, 16 Gray, 20; *State v. Whipple*, 57 Vt. 637; *Tiffany v. Driggs*, 13 Johns. 258; *State v. Anderson*, 3 Rich. 172; *Miazza v. State*, 36 Miss. 613; *Dansey v. State*, 23 Fla. 316, 2 South. Rep. 692; *Fitzpatrick v. State*, 37 Ark. 373; *Buckner v. State*, 56 Ind. 207; *Fowler v. State*, 85 Ind. 533; *State v. Curley*, 33 Iowa, 359; *State v. Small*, 31 Mo. 197.

¹⁴⁴ *Comm. v. Carroll*, 15 Gray, 409.

son on a certain day, and evidence of other sales to that person is admitted, the court may properly instruct the jury to convict if they shall find that the accused sold to that person at any time within two years prior to the finding of the indictment.¹⁴⁵ Again, where an information charged the defendant with five distinct offenses in as many counts, it was held that an instruction to the jury that, to find him guilty as charged in each count, they must find that he sold to the person and at the time as therein charged, would be erroneous.¹⁴⁶ In some of the states, the opinion prevails that proof of a number of sales about the time alleged in the indictment and prior to the finding thereof, is sufficient to warrant a conviction.¹⁴⁷ But elsewhere it is ruled that, under an indictment charging a sale on a particular date, the evidence must be addressed to some one specific instance of selling, although it may be on a different date. Hence, the indictment being so framed, evidence of distinct sales, made to different persons at dates reaching back a month from the date alleged, is not admissible.¹⁴⁸

§ 514. Same; Continuing Offense.

When the offense charged against the defendant is continuous in its nature, (as, maintaining a liquor nuisance, keeping liquors for unlawful sale, being a common seller, etc.,) and the indictment lays the time with a *continuando*, by alleging the offense to have been committed on a day named and from that day to the finding of the indictment, or during a defined period, the evidence as to time need not be as broad as the allegation; it will be sufficient if the offense is shown to have been committed during any part of the time charged.¹⁴⁹ And under a complaint for keeping a liquor nuisance on divers days between a day named and the day of the filing of the complaint, evidence of what took place on the day the complaint was

And see *Olmstead v. State*, (Ala.) 9 South. Rep. 737.

¹⁴⁵ *State v. Elliott*, (Kans.) 26 Pac. Rep. 55.

¹⁴⁶ *State v. Mallory*, 11 Iowa, 239.

¹⁴⁷ *Koch v. State*, 32 Ohio St. 353.

¹⁴⁸ *Boldt v. State*, 72 Wis. 7, 38 N. W. Rep. 177.

¹⁴⁹ *Comm. v. Wood*, 4 Gray, 11; *Comm. v. Armstrong*, 7 Gray, 49; *Comm. v. Lamere*, 11 Gray, 319; *Comm. v. Hersey*, (Mass.) 9 N. E. Rep. 338; *Clinton v. State*, 33 Ohio St. 27.

filed is admissible to show the intent with which the liquors were kept.¹⁵⁰ But it has been held that where the offense is of this character, and where the time is set out with a *continuando*, time is so far material that the evidence must be confined to acts which happened within the days alleged, and proof of anything prior to such days cannot be admitted.¹⁵¹ And this rule appears to be now settled in the states of Maine and Massachusetts at least. But it is controverted, in some other jurisdictions, so directly, and with such show of reason, that its general applicability may be seriously doubted. In Kansas, for instance, it is fairly held that, on an indictment for maintaining a liquor nuisance, the state may show that the offense was committed at a time prior to that alleged.¹⁵² And in Vermont, it is

¹⁵⁰ Comm. v. Carney, (Mass.) 26 N. E. Rep. 94; Comm. v. Moore, 147 Mass. 528, 18 N. E. Rep. 403; Comm. v. Shea, 14 Gray, 386.

¹⁵¹ State v. Small, 80 Me. 452, 14 Atl. Rep. 942; Comm. v. Briggs, 11 Metc. (Mass.) 573; Comm. v. Purdy, 146 Mass. 138, 15 N. E. Rep. 364; Comm. v. Slosson, (Mass.) 25 N. E. Rep. 835; Brevaldo v. State, 21 Fla. 789.

¹⁵² State v. Reno, 41 Kans. 674, 21 Pac. Rep. 803. In this case, after noticing certain citations from the two states named, the court said: "We think these cases do support the claim made by the defendant; and while they evidently state the law of Massachusetts and Maine, we do not think that they state the law as it exists elsewhere. It is not the English common law as understood in England, or in this country outside of Massachusetts and Maine. The general rule of law is that it is not necessary to prove that the offense was committed at the time at which it is alleged to have been committed, but it may be proved to have been committed at any time within the period prescribed by the statute of limitations within which the action might be commenced. There are some exceptions to this general rule, as where offenses cannot be committed except on certain days or within

certain specific portions of time, as on Sunday, on the Fourth of July, on election days, or in the night-time. But this present case does not come within any of the exceptions mentioned by any of the authorities as existing anywhere except in Massachusetts and Maine. See the following authorities supporting the general doctrine: 2 Hawk. P. C. p. 613, § 169; 1 Archb. Crim. Pr. *119; 5 Bac. Abr. 'Indictment,' G, 4; Rosc. Crim. Ev. 89; Whart. Crim. Ev. § 103; 1 Bish. Crim. Proc. §§ 397, 402, and notes. Mr. Bishop does not regard 'the peculiar Massachusetts doctrine' as being good law, and believes it to be against reason and against all authority elsewhere. We know of no adjudicated cases outside of Massachusetts and Maine precisely in point. However, in Oregon, in the case of State v. Ah Sam, 13 Pac. Rep. 303, [14 Oreg. 347,] the supreme court took occasion to express their disapproval of the Massachusetts doctrine. Certainly, if an offense consisting of a single act, and alleged to have been committed on a certain day, may be proved to have been committed on some other day, it would seem that an offense continuous in character, or consisting of several distinct acts committed at different times, and alleged to have been committed within a certain

said that, on such a prosecution, evidence of the character of the place on a day before or after the day alleged is admissible, as tending to show that it was a statutory nuisance on any day within the time limited for the prosecution.¹⁵³ When the offense charged is continuous in its character, (as that of being a common seller of liquors,) but is alleged to have been committed on a particular day, the court in Massachusetts holds that evidence of sales before or after that day is not admissible.¹⁵⁴ But the soundness of this rule is open to question on the same grounds to which we have just adverted.

§ 515. Same; Sale on Sunday.

When the criminal act charged is a sale of liquor on Sunday, it must be proved to have been made on that day of the week. But the day of the month, if specified, need not be proved as alleged. For even if the date given fell upon some other day of the week, still, if the indictment explicitly names Sunday as the day of the offense, the error is immaterial and may be disregarded.¹⁵⁵ And indeed, evidence of a sale on any Sunday within the period of limitations will be sufficient to sustain a conviction.¹⁵⁶ And it has been said that if the evidence shows a sale on some Sunday within two years before the finding of the indictment, it need not fix the precise Sunday within that time.¹⁵⁷ But it is clear that the *year* of the offense must be proved; it is not enough to show that the sale was made on a Sunday and on a given day of the month, although, in point of fact, that

period of time, consisting of many days or even months, might be proved to have been committed within some other period of time; provided, of course, that the offense which is proved is not barred by any statute of limitations."

¹⁵³ *State v. Haley*, 52 Vt. 476. In Rhode Island, it is said that evidence that the defendant is the occupant of a tenement in which a bar-room is kept, need not be confined to the period of the time laid in the indictment as that during which he applied a portion of it to

the criminal use of a bar-room, although the proof of such criminal use must be; but his occupation both before and after such period may be given in evidence, as affording proof of his occupation during such period. *State v. Knott*, 5 R. I. 293.

¹⁵⁴ *Comm. v. Elwell*, 1 Gray, 463; *Comm. v. Gardner*, 7 Gray, 494.

¹⁵⁵ *Supra*, § 479.

¹⁵⁶ *Koop v. People*, 47 Ill. 327; *Megowan v. Comm.*, 2 Metc. (Ky.) 3.

¹⁵⁷ *Pancake v. State*, 81 Ind. 93.

day of that month, in a year which was within the period of limitations, was Sunday.¹⁵⁸

§ 516. Evidence as to Place of Offense.

Under an indictment for a violation of the liquor laws, it is essential that the evidence as to place should be at least specific enough to show that the offense was committed within the territorial jurisdiction of the court.¹⁵⁹ Some of the authorities go further than this, and require proof of the place as laid in the indictment. Thus, it has been held that an indictment charging the sale of liquor in the county of A., is not sustained by proof of a sale in the incorporated city of B., though that is in the county named.¹⁶⁰ The same rule has been applied where the indictment charged a sale in one township and the proof showed a sale in another.¹⁶¹ But in a case where the evidence showed that the sale was made at defendant's store, but did not show whether the store was in the district laid in the indictment, it was held that the jury might infer, from any facts within their own knowledge, that the store was within the venue.¹⁶² At any rate, when the averment that the sale was made at a particular place is made by way of local description, and not as mere allegation of venue, the proof must correspond with the averment.¹⁶³ And where the indictment is for the maintenance of a liquor nuisance, the place must be proved as laid in the indictment.¹⁶⁴ In a complaint for a violation of the screen law, the fact that the licensed premises are described as a certain room, while the license produced in evidence

¹⁵⁸ *Lehritter v. State*, 42 Ind. 383.

¹⁵⁹ *Jackson v. State*, 19 Ind. 312; *Sohn v. State*, 18 Ind. 389; *Deck v. State*, 47 Ind. 245; *Long v. State*, 56 Ind. 206; *Garst v. State*, 68 Ind. 37; *Savage v. Comm.*, 84 Va. 582, 5 S. E. Rep. 563.

¹⁶⁰ *Botto v. State*, 26 Miss. 108.

¹⁶¹ *Moore v. State*, 12 Ohio St. 387.

¹⁶² *State v. Williams*, 3 Hill, (S. Car.) 91.

¹⁶³ *Moore v. State*, 12 Ohio St. 387. Un-

der an indictment for the sale of liquor within two miles of the limits of a city, the legal establishment of those limits cannot be inquired into. The *de facto* limits may be proved by parol. *Albia v. O'Harra*, 64 Iowa, 297, 20 N. W. Rep. 444.

¹⁶⁴ *Comm. v. Heffron*, 102 Mass. 148; *Comm. v. Boyden*, 14 Gray, 101; *State v. Gurlagh*, 76 Iowa, 141, 40 N. W. Rep. 141.

covers that room and also the cellar, does not constitute a material variance.¹⁶⁵

§ 517. Identification of Purchaser.

While, as we have already seen, the authorities are conflicting upon the question whether an indictment for an unlawful sale of liquor must describe the purchaser by name,¹⁶⁶ yet it appears to be settled, without much dissent, that if the purchaser is so described, the proof must correspond with the allegation, and the indictment will not be sustained by evidence of a sale to a different person.¹⁶⁷ But it is said that, under an allegation of a sale to H. and "other persons unknown," evidence of a sale to a person other than H. is admissible.¹⁶⁸ Whether an indictment charging an unlawful sale to one person is sustained by proof of a joint sale to that person and another, is a disputed point. It is ruled in the affirmative in Texas,¹⁶⁹ and in the negative in Indiana.¹⁷⁰ In Georgia, the doctrine prevails that, on an indictment charging the sale of liquor to two named persons, proof of a sale to either of them will warrant a conviction, as the offense is complete when a sale is made to one.¹⁷¹ An indictment charging a sale of liquor as made to a person named will be supported by evidence that it was made to him through his servant or messenger, and the latter need not be mentioned by name or otherwise in the indictment.¹⁷² The name of the purchaser, if specified, must be proved with due certainty. Thus, where the indictment was

¹⁶⁵ *Comm. v. Keefe*, 140 Mass. 301, 4 N. E. Rep. 576.

¹⁶⁶ *Supra*, § 464.

¹⁶⁷ *State v. Hays*, 36 Mo. 80; *Comm. v. Blood*, 4 Gray, 81. An indictment for a sale of liquor "to a certain person whose name is Mary Garland," is not supported by proof of a sale to a person whose name at the time of the sale was Mary Garland, but who, before the indictment was found, acquired a new surname by marriage. *Comm. v. Brown*, 2 Gray, 358. An allegation of an unlawful sale of liquor to "John Hairholser" is not sustained by proof of a sale to "John

Hairholts." *Mitchell v. State*, 63 Ind. 276. But where the complaint charged the sale to have been made to one William Shepard, and the evidence showed a sale to William Hezekiah Shepard, it was held that there was no variance. *State v. Feeny*, 13 R. I. 623.

¹⁶⁸ *State v. Finan*, 10 Iowa, 19.

¹⁶⁹ *Ryan v. State*, 32 Tex. 280.

¹⁷⁰ *Brown v. State*, 48 Ind. 38.

¹⁷¹ *Hall v. State*, (Ga.) 13 S. E. Rep. 634; *Dukes v. State*, 79 Ga. 795, 4 S. E. Rep. 876.

¹⁷² *Hall v. State*, (Ga.) 13 S. E. Rep. 634.

for giving liquor to Edward Gresh, a minor, and the evidence showed that the liquor was given to "Gresh," and that "Gresh" was nineteen years old, it was held that it was not proved that the liquor was given to the person named in the indictment, and the evidence was therefore insufficient.¹⁷³ But the failure of the state to prove the name of the purchaser is immaterial, when the defendant himself has given the requisite proof.¹⁷⁴

§ 518. Evidence under Allegation of Sale to a "Person Unknown."

When the allegation in regard to the purchaser is that the sale was made to "a person unknown" to the complainant or the grand jury, a majority of the decisions hold that the fact of the buyer being unknown is a material part of the case, and that, with such an allegation in the indictment, there can be no conviction on proof of a sale made to a person who was known to the complainant or the jurors at the time of preferring the indictment.¹⁷⁵ In a case in Massachusetts, on this point, it was held correct to rule, at the trial, that the burden was upon the government to prove that the alleged sale was to a person whose name was unknown to the complainant, but that this might be proved by the person to whom the sale was made; and that it would be presumed, there being no evidence to the contrary, that that person or his name was unknown to the complainant; but that, if this presumption was rebutted or overcome by evidence introduced by either party, the defendant was entitled to a verdict.¹⁷⁶ But such an allegation is supported by evidence of a sale to a person whose name was known to the complainant, if the complainant, at the time of making the complaint, did not know that the sale was to that person.¹⁷⁷ Where the indictment charges the sale of liquor to a named person and other persons to the accuser unknown, it is held, in

¹⁷³ *Meyer v. State*, 50 Ind. 18.

¹⁷⁴ *Stolte v. State*, 115 Ind. 128, 17 N. E. Rep. 258.

¹⁷⁵ *Moore v. State*, 79 Ga. 498, 5 S. E. Rep. 51; *Comm. v. Pratt*, 145 Mass. 248, 13 N. E. Rep. 886; *Comm. v. Herrick*,

12 Gray, 125. Compare *State v. Coulter*, 40 Kans. 87, 19 Pac. Rep. 368; *Comm. v. Luddy*, 143 Mass. 563, 10 N. E. Rep. 448.

¹⁷⁶ *Comm. v. Thornton*, 14 Gray, 41.

¹⁷⁷ *Comm. v. Hendrie*, 2 Gray, 503.

Georgia, that a joint sale to both, or a several sale to either, in which the named person participated, may be established, but not a several sale to a person, known or unknown, made when the named person was not present, and in which he was not concerned.¹⁷⁸ But in Missouri, under an allegation so framed, where the evidence showed sales to other parties, but none to the named person, it was held that the variance between the pleadings and proofs was immaterial.¹⁷⁹

§ 519. Evidence of Quantity of Liquor Sold.

Where the statute provides that no unlicensed person, or no person without a license of a certain sort, shall sell liquor in "less than" a certain quantity, it is necessary, to make out an offense under the act, that the evidence should show that the particular sale charged was of a quantity below the statutory minimum.¹⁸⁰ But where the indictment charges the defendant with selling one quart, one pint, or any other specific quantity of liquor, and more especially where the quantity is laid under a *videlicet*, it is not necessary, in order to convict, that it should be proved that he sold the exact quantity mentioned in the indictment; it is sufficient if it be shown that he made the sale charged, and that the quantity sold was less than the minimum prescribed in the statute.¹⁸¹ In one case, under an indictment for unlawfully selling liquor in a quantity less than a quart, the evidence showed that a "drink" was sold, for which ten cents was paid; and it was held that the jury were authorized to find that the quantity was less than a quart.¹⁸² So, where the indictment charged the sale of "one drink of whisky, less than a quart," and the testimony proved the sale of "a dram," it was considered sufficient to show a violation of the law.¹⁸³ Neither is it necessary that any witness should expressly state the quantity sold, if there is evidence that it was less than the quantity the law allows.¹⁸⁴ The testimony will sometimes

¹⁷⁸ Moore v. State, 79 Ga. 498, 5 S. E. Rep. 51.

¹⁷⁹ State v. Wolff, 46 Mo. 584.

¹⁸⁰ State v. Brosius, 39 Mo. 534.

¹⁸¹ Comm. v. Buck, 12 Metc. (Mass.) 524; Comm. v. Dillane, 11 Gray, 67; State v. Moore, 14 N. H. 451; State v.

Connell, 38 N. H. 81; State v. Cooper, 16 Mo. 551; State v. Andrews, 28 Mo. 17.

¹⁸² Hamilton v. State, 103 Ind. 96, 2 N. E. Rep. 299.

¹⁸³ Lacy v. State, 32 Tex. 227.

¹⁸⁴ Keiser v. State, 84 Ind. 229.

show a sale, at one and the same time, of several measures of liquor, each singly below the minimum, but aggregating more than that quantity. The circumstances must then determine whether the transaction amounted to one sale of the whole or separate sales of the component parts. For example, in a case in Indiana, it appeared that a man brought three friends with him to defendant's saloon and called for four glasses of beer, which defendant supplied, and for which the man paid, and which were then drunk, one by each of the party. Each of the glasses held less than a pint, three of them together holding a quart. It was held that the evidence showed a sale of four several glasses of beer, containing each less than a pint, within the meaning of the statute.¹⁸⁵ But on the other hand, evidence that defendant sold to the witness three pint bottles of beer for fifty cents, which was the regular price, though the price of each bottle singly was twenty cents, and wrapped them up in a bundle, and delivered them to the witness, who carried them off the premises, is not sufficient to sustain a conviction under a statute which prohibits the unlicensed sale of liquors in less quantities than one quart.¹⁸⁶ Where the prosecution is for selling liquor in quantities of a quart *or more*, contrary to the statute, the jury may properly be instructed that it is not necessary for the state to show that the quantity sold was not a drop less than a legal quart; as, for instance, where the liquor was sold in an ordinary brandy bottle, commonly known as a quart bottle, but in reality holding something less than a quart.¹⁸⁷

§ 520. Evidence as to Kind of Liquor Sold.

Where the allegation in the indictment, in regard to the kind of liquor charged to have been sold, copies the general language of the statute, the proof will be sufficient if it shows a sale of any specific variety of liquor coming within those general terms. An indictment charging the sale of "intoxicating liquors and mixed liquors, part of which was intoxicating," is supported by proof of a sale of intoxi-

¹⁸⁵ *Weireter v. State*, 69 Ind. 269.

¹⁸⁷ *Scott v. State*, 25 Tex. Supp. 168.

¹⁸⁶ *Olmstead v. State*, (Ala.) 8 South. Rep. 668.

cating liquors not mixed.¹⁸⁸ So an allegation that defendant sold "spirituous liquor" is supported by proof that he sold brandy or gin mixed with sugar and water.¹⁸⁹ If the allegation of the kind of liquor sold is placed under a *videlicet*, this will excuse the prosecution from strict proof, unless the matter should become essentially descriptive of the offense.¹⁹⁰ It has been held that where the indictment charged the sale of intoxicating liquor "to wit, whisky, brandy, rum, and gin," and the evidence showed that the liquor sold was alcohol, and not either of those named, the defendant should be acquitted.¹⁹¹ But this decision does not appear to accord with the settled rules of criminal pleading. It is certain, however, that if a specific kind of liquor is named in the indictment, not accompanied by general descriptive terms, it must be proved as charged. This is in accordance with the rule that where a thing necessary to be mentioned in an indictment is described with unnecessary particularity, the thing must be proved as described. Thus, an indictment charging the unlawful sale of "whisky" is not supported by proof of the sale of any other kind of liquor.¹⁹² And on such a charge, proof of the sale of "Home Bitters" is irrelevant, unless it is shown to be made of whisky.¹⁹³ But proof of sales of liquor other than that for which a conviction is sought is admissible upon the question of the intent with which the sale was made, defendant justifying under a druggist's license.¹⁹⁴

The determination of the species of liquor sold is not a question for expert testimony exclusively. A person, for example, who has frequently drunk fermented liquors, and is able to distinguish them by their taste, is competent to testify that a particular liquor which he has tasted is or is not fermented, although he has no knowledge of chemistry.¹⁹⁵ So, where a witness testifies positively that he tasted liquor in a bottle which he got from the accused, and that it was whisky, which he knew because he had drunk whisky before, there

¹⁸⁸ Comm. v. Leonard, 11 Gray, 458;
Comm. v. Burns, 9 Gray, 287. See
Comm. v. Giles, 1 Gray, 466.

¹⁸⁹ Comm. v. White, 10 Metc. (Mass.)
14.

¹⁹⁰ Frisbie v. State, 1 Oreg. 248.

¹⁹¹ State v. Smith, 38 Mo. App. 618.

¹⁹² State v. Hesner, 55 Iowa, 494, 8 N.
W. Rep. 329.

¹⁹³ Williams v. State, 35 Ark. 430.

¹⁹⁴ Dobson v. State, 5 Lea, 271.

¹⁹⁵ Merkle v. State, 37 Ala. 139.

is sufficient evidence of that fact to support a verdict of guilty.¹⁹⁶ And under an indictment charging the sale of blackberry wine, it is sufficient to show that the witness called for blackberry wine, and received in response a bottle of liquor and a glass, from which he drank a gill, whether or not he could tell blackberry wine from blackberry brandy.¹⁹⁷ This fact—that the witness called for the particular kind of liquor alleged to have been sold, and received liquor purporting to be of that kind, and drank it as such—is always admitted as competent evidence on the point, and is sufficient proof to determine the species of the liquor, unless overborne by other evidence.¹⁹⁸ It is also admissible to introduce as evidence a bottle containing whisky, which is fully identified by the witness as the whisky which he bought from the defendant.¹⁹⁹ Even less direct evidence than this may be received under proper circumstances. Thus, under an information charging the unlawful sale of intoxicating liquors, there was proof that the defendant sold a beverage called “Phoenix” which stimulated and intoxicated those who drank it; and it was held that evidence that defendant had a barrel of whisky on tap in his place of business tended to support the charge and was admissible.²⁰⁰ Declarations by defendant at the time of the sale of liquor that it was medicine are not evidence that it was so.²⁰¹

§ 521. Proof of Intoxicating Properties of Liquor.

On a trial for selling intoxicating liquors in violation of law, it is necessary to show by the evidence that the liquor sold was intoxicating.²⁰² There are certain kinds of liquor in regard to which the courts will take judicial notice that they are intoxicating, such as whisky, brandy, rum, or gin. And hence, for example, if the testimony shows that the article sold was whisky, it is not necessary to

¹⁹⁶ *Territory v. Pratt*, (Dak.) 43 N. W. Rep. 711; *Burrell v. State*, 25 Nebr. 581, 41 N. W. Rep. 399.

¹⁹⁷ *Taylor v. State*, 113 Ind. 471, 16 N. E. Rep. 188.

¹⁹⁸ *Kammann v. People*, 26 Ill. App. 48; *Baurose v. State*, 1 Clarke, (Iowa,) 374.

¹⁹⁹ *Comm. v. Stevens*, 142 Mass. 457, 8 N. E. Rep. 344.

²⁰⁰ *State v. Pfefferle*, 36 Kans. 90, 12 Pac. Rep. 406.

²⁰¹ *Sills v. State*, 76 Ala. 92.

²⁰² *Josephdaffer v. State*, 32 Ind. 402; *Houser v. State*, 18 Ind. 106; *Burrell v. State*, 25 Nebr. 581, 41 N. W. Rep. 399.

follow this up with proof that whisky is intoxicating.²⁰³ But as a general rule, and especially where the liquor sold was disguised as a "tonic" or "bitters," or was called by some fanciful name with a view to eluding the law, the question whether or not it was intoxicating liquor is one of fact to be determined by the jury.²⁰⁴ In regard to beer, ale, and cider, it is doubtful whether their intoxicating properties must not be proved. As we have pointed out in another place, many authorities hold that the question, in regard to such liquors, is whether their use is ordinarily or commonly attended with entire or partial intoxication, and that this is for the jury; though there are also numerous decisions that judicial notice may be taken that these are intoxicating liquors.²⁰⁵ Of course, if the statute declares that ale, beer, or cider shall be deemed intoxicating, this dispenses with the necessity of evidence on that point.²⁰⁶

Proof of the intoxicating character of the liquor in question may be made by evidence of the effect of its use, derived from experiment, or by the opinion of a witness. The witness need not be an expert, if he has had personal experience or observation such as to enable him to form a correct opinion.²⁰⁷ And in one case, it was held that the jury were warranted in finding the liquor to be intoxicating, merely on the testimony of a witness who saw and smelled it but did not taste it.²⁰⁸ Proof that the witnesses were made drunk by the use of the article in question, or that it produced symptoms of intoxication in them similar to those developed by the use of whisky or other admittedly alcoholic beverages, is also proper to go to the jury, even though no direct evidence or expert testimony has been introduced on the point.²⁰⁹ And the presence of drunken persons about defendant's place may also be corroborative evidence. Thus, if the

²⁰³ *Supra*, §§ 12-15.

²⁰⁴ *State v. Wall*, 34 Me. 165.

²⁰⁵ *Supra*, §§ 16-18.

²⁰⁶ *Comm. v. Shea*, 14 Gray, 336.

²⁰⁷ *Carl v. State*, 87 Ala. 17, 6 South. Rep. 118. See, also, *Comm. v. White*, 15 Gray, 407; *Comm. v. Peto*, 136 Mass. 155; *Savage v. Comm.*, 84 Va. 582, 5 S. E. Rep. 563.

²⁰⁸ *Haines v. Hanrahan*, 105 Mass. 480.

²⁰⁹ *Comm. v. Reyburg*, 122 Pa. St. 299, 16 Atl. Rep. 351; *Brantly v. State*, (Ala.) 8 South. Rep. 816. See *Fairly v. State*, 63 Miss. 333. But if the state's witness testifies that the beverage sold by defendant intoxicated the witness, defendant may show that others, who drank it, were not intoxicated. *Knowles v. State*, 80 Ala. 9.

defense set up is that the only liquor kept at defendant's shop was a kind of beer that was not intoxicating, the prosecution may show that, several days before the day named, men were seen to go into defendant's place sober and come out drunk.²¹⁰ And it is proper to prove that the "bitters" in question were bought and used as a beverage, and drunk as such in the community.²¹¹ And in general, that the liquor sold was intoxicating may be shown by any circumstantial evidence satisfactory to the trial court.²¹² Thus, evidence showing that a customer called for beer, and was given liquor that looked like beer, with other evidence of like nature, will be sufficient to throw upon the defendant the burden of disproving the intoxicating character of the liquor.²¹³ So also, testimony that the defendant had whisky in stock at his place of business about the time of the alleged sale, and that persons who drank the beverage sold became intoxicated, is admissible on this question.²¹⁴ And where the question is as to the quality of the liquor sold on a Sunday, and it is not disputed that intoxicating liquor was sold at the same place on weekdays, a conviction will not be disturbed.²¹⁵ The fact that the jury, under proper instructions as to identity of quality, were allowed to take with them, on retiring, a bottle of liquid called "ale," which, though not part of the liquors seized, was manufactured and sold by the same person under the same name, affords no ground of exception.²¹⁶

§ 522. Same; Chemical Analysis.

Where the statute provides that all liquors containing more than a certain proportion of alcohol shall be deemed intoxicating, the proper method of showing the intoxicating character of a particular beverage in question is by the results of a chemical analysis. It is to be pre-

²¹⁰ Comm. v. O'Donnell, 143 Mass. 178, 9 N. E. Rep. 509.

²¹¹ Carl v. State, 87 Ala. 17, 6 South. Rep. 118.

²¹² Dant v. State, 83 Ind. 60. See State v. Matheison, 77 Iowa, 485, 42 N. W. Rep. 377; Comm. v. Savery, 145 Mass. 212, 13 N. E. Rep. 611; State v. Schultz, 79 Iowa, 478, 44 N. W. Rep. 713.

²¹³ State v. Cloughly, 73 Iowa, 626, 35 N. W. Rep. 652.

²¹⁴ State v. Adams, 44 Kans. 135, 24 Pac. Rep. 71; State v. Pfefferle, 36 Kans. 90, 12 Pac. Rep. 406.

²¹⁵ People v. Beller, 73 Mich. 640, 41 N. W. Rep. 827.

²¹⁶ State v. McCafferty, 63 Me. 223.

sumed that a chemist, employed to analyze liquor, analyzed it on the lines laid down by the statute, and that he understood the purpose for which he analyzed it.²¹⁷ The admission of such evidence is of course conditional upon proper proof of identity. But where a witness testified that on a certain day he corked, sealed, labelled, and sent by express from F. to a state assayer in B., in the same state, a bottle of beer, it is proper to admit testimony of the assayer as to the intoxicating quality of a bottle of beer, so labelled, received by him the next day by express.²¹⁸

§ 523. Proof of Being a Common Seller.

In Massachusetts, it is made an offense to be a "common seller" of liquors without a license, and the statute provides that proof of three several sales by an unlicensed person "shall be sufficient evidence" to convict. Under this law, the jury are not merely authorized, but required, to convict upon mere proof of three several unlawful sales of liquor by the defendant within the time alleged.²¹⁹ And evidence of three transactions, with sale, purchase, and delivery, distinct from each other, although at a single visit of the purchasers, and in pursuance of a preconcerted plan to obtain evidence against the seller, is competent proof of three sales.²²⁰ Nor is it necessary to prove three specific sales by direct evidence, but if the whole evidence satisfies the jury that the defendant had made as many as three sales during the time alleged in the indictment, they may find him guilty.²²¹ It is also held that one may be convicted of this offense on well combined circumstantial evidence, such as the presence of intoxicated persons in his place of business, liquors found there, glasses on the bar, beer-pumps and other materials of the traffic, efforts to conceal liquor on the entrance of the officers, and the like.²²² But evidence that the defendant, during a part of the time

²¹⁷ *Comm. v. Magee*, 141 Mass. 111, 4 N. E. Rep. 819.

²¹⁸ *Comm. v. Bentley*, 97 Mass. 551.

²¹⁹ *Comm. v. Barker*, 14 Gray, 412.

²²⁰ *Comm. v. Graves*, 97 Mass. 114.

²²¹ *Comm. v. Dady*, 7 Allen, 531;

Comm. v. Mahony, 14 Gray, 46. See *Comm. v. Snow*, 14 Gray, 385.

²²² *Comm. v. Cotter*, 97 Mass. 336; *Comm. v. Van Stone*, Id. 548; *Comm. v. Webster*, 6 Allen, 593; *Comm. v. Boyden*, 14 Gray, 101. See *Comm. v.*

covered by the indictment, kept a public house, and had upon it an inn-keeper's sign, is irrelevant and inadmissible; because one may be licensed as an inn-keeper without the right to sell liquors, and it cannot be presumed that he violated the law.²²³ Another statute in the same state provides that delivery of intoxicating liquor in or from any building other than a dwelling-house shall be deemed *prima facie* evidence of a sale. This, it is held, applies to a prosecution for being a common seller; and the defendant has no ground of exception to an instruction that such delivery is *prima facie* evidence, but not conclusive, and that if in the opinion of the jury there is no evidence to control it, it is their duty to convict if enough sales are proved.²²⁴ It is incumbent on the state, in a trial for this offense, to prove that the sales relied on were not such as the defendant might lawfully make without license or written authority.²²⁵

§ 524. Proof of Pursuing Business of Liquor-Selling.

Where the offense charged is that of "pursuing" or "engaging in" or "carrying on" the business of selling liquor, without a license, or without payment of the tax, the proof is somewhat different from that in the cases already considered. Evidence that a person is reputed to deal illegally in liquors is not admissible to show that such is his business.²²⁶ But it may be shown that the defendant, before commencing to sell, told various persons that he intended to sell liquors, and that casks and barrels were seen in his yard, and that a man was seen unloading them there.²²⁷ And a single sale may be made under circumstances indicating that it was made in the course of the seller's usual business; and hence, although it may not be sufficient in itself to prove the continuance of the business or that that was the seller's business, it is competent evidence on that point and should go to the jury.²²⁸ So also, evidence that, during the time defendant is charged with having carried on the business, freight and transfer

Munn, 14 Gray, 361; Comm. v. Tubbs, 1 Cush. 2.

²²³ Comm. v. Madden, 1 Gray, 486.

²²⁴ Comm. v. Pillsbury, 12 Gray, 127.

²²⁵ Comm. v. Livermore, 2 Allen, 292.

²²⁶ Warner v. Brooks, 14 Gray, 107.

²²⁷ Comm. v. Davenport, 2 Allen, 299.

²²⁸ Comm. v. Coolidge, 138 Mass. 193.

See Lawson v. State, 55 Ala. 118.

agents received and delivered large quantities of intoxicating liquors consigned to him, is competent.²²⁹ In one case, evidence that defendant was seen "three or four or five times" engaged in distilling rum, was held sufficient to authorize his conviction for being engaged in that business.²³⁰ And in another case, it was considered that a conviction might be had on proof that defendant, "on a few several occasions, sold case whisky in quantities less than a quart," and that he had no license.²³¹

§ 525. Proof of Keeping Liquors for Unlawful Sale.

Where the prosecution is for the statutory offense of keeping intoxicating liquors with intent to sell the same in violation of law, possession and intent are the two essential facts to be proved. No actual sale is necessary to complete the offense. And hence a case may be made out under such a statutory provision without any evidence showing a sale or an offer or attempt to sell.²³² But of course the fact of sales being made is admissible and strong evidence. And the unlawful intent with which liquors were kept may be presumed from the fact of their sale in violation of law.²³³ Hence, although evidence to prove a particular sale should not be received for the purpose of convicting the defendant of that sale as an offense, unless it is so charged in the indictment, it is admissible as showing the intent with which the liquor so sold was kept.²³⁴ The fact of liquors being found on the defendant's premises will ordinarily be sufficient to establish the fact of his keeping them. But this alone does not make out the whole offense. In addition, the jury must find that, on the day when the liquor was so found, the defendant kept it with intent to sell, and

²²⁹ *Hanlon v. State*, 51 Ark. 186, 10 S. W. Rep. 265; *Klepfer v. State*, 121 Ind. 491, 28 N. E. Rep. 287.

²³⁰ *Grant v. State*, 73 Ala. 13.

²³¹ *Lemons v. State*, 50 Ala. 130.

²³² *State v. McGlynn*, 34 N. H. 422. A complaint for unlawfully exposing and keeping for sale intoxicating liquors, with intent unlawfully to sell the same, is supported by proof of the keeping with intent, though there was no ex-

posure. *Comm. v. Atkins*, 136 Mass. 160; *Comm. v. Henderson*, 140 Mass. 303, 5 N. E. Rep. 832; *Comm. v. Welch*, 140 Mass. 372, 5 N. E. Rep. 166.

²³³ *State v. Sartori*, 55 Iowa, 340, 7 N. W. Rep. 604; *State v. Munzenmaier*, 24 Iowa, 87. See *Comm. v. Fitzgerald*, 14 Gray, 14; *Comm. v. Gavin*, 148 Mass. 449, 18 N. E. Rep. 675.

²³⁴ *State v. Hartwick*, 49 Conn. 101; *State v. Raymond*, 24 Conn. 204.

they have a right, from the circumstances, to say whether the defendant did or did not keep such liquor for sale.²³⁵ But from evidence of the unexplained possession of liquors under suspicious circumstances, the jury will be justified in inferring an intent to sell them.²³⁶ And when evidence has been given that the defendant kept a saloon both before and after the date named in the complaint, the prosecution may show, on the question of intent, that the defendant had liquor at his saloon a week or ten days later than that date. "Upon the question of intent, in such a case, the acts of the defendant soon after, as well as shortly before, the act complained of, may have a bearing."²³⁷ In Vermont, in aid of prosecutions of this sort, the statute makes the fact of finding liquor in a man's house *prima facie* evidence of an intent to sell.²³⁸ And in Rhode Island, it is provided by law that "evidence of the sale or keeping of intoxicating liquors for sale . . . shall be evidence that the sale or keeping is illegal."²³⁹ And in cases where the person accused would have a legal right to sell certain kinds of liquor, or to sell any kind for certain permitted purposes, his stock on hand may furnish evidence of the unlawful intent which he entertained. Thus, in a prosecution against a druggist, in determining the purpose for which he kept liquors, the jury may consider the amount and kinds kept.²⁴⁰ And so, evidence tending to show that defendant kept ale for sale in his house at a certain time, is competent on the question whether spirituous liquors, which he kept there at the same time, were kept for sale.²⁴¹ The intent to sell unlawfully may also be proved by even less direct evidence; for instance, by evidence of the condition of the room where the liquors were alleged to be kept, as to its appointments and fix-

²³⁵ Comm. v. Berry, 109 Mass. 366.

²³⁶ Comm. v. Fisher, 138 Mass. 504; Comm. v. Gallagher, 124 Mass. 29; Comm. v. Levy, 128 Mass. 240. See, also, Comm. v. Purtle, 11 Gray, 78; Comm. v. Tenney, 148 Mass. 452, 19 N. E. Rep. 556. But one charged with the illegal keeping of intoxicating liquors in a dwelling-house and its appurtenances, cannot be convicted on proof that he kept liquors in a stable not used in connection with the dwelling house,

where the stable was used exclusively by defendant, and the house exclusively by another person. State v. Kelleher, 81 Me. 346, 17 Atl. Rep. 168.

²³⁷ Comm. v. Matthews, 129 Mass. 487.

²³⁸ Lincoln v. Smith, 27 Vt. 328.

²³⁹ State v. Hoxsie, 15 R. L. 1, 22 Atl. Rep. 1059.

²⁴⁰ State v. Shank, 74 Iowa, 649, 38 N. W. Rep. 523.

²⁴¹ State v. Gorman, 58 N. H. 77.

ures.²⁴² So the jury may convict on evidence that defendant's place was a place of common resort; that intoxicated persons were seen to come from there; that, at the time of a search, there were signs of recent drinking; and that defendant, within a month, was engaged in laying in a stock of liquor.²⁴³ So again, evidence that the defendant, on being arrested, tried to conceal a bottle of liquor in his pocket, and afterwards threw it away, is competent evidence on the question of his illegally keeping liquor for sale.²⁴⁴ But testimony that it has been a matter of common report and public notoriety that intoxicating liquors were sold by the defendant is not admissible.²⁴⁵ Neither is it proper to receive evidence that, some months before the offense charged, defendant promised not to sell any more liquor on certain conditions.²⁴⁶ Where the defendant testifies that he had given, but not sold, liquors to the persons to whom sales are charged to have made, (as evidence of his illegal intent,) he should call such persons in corroboration of his evidence; and if he does not, the jury may take that circumstance into consideration.²⁴⁷

§ 526. Proof of Keeping Place for Unlawful Sale.

On the trial of an indictment for the statutory offense of "maintaining a tenement used for the illegal keeping and illegal sale of intoxicating liquors," it is not necessary for the prosecution to prove an act of sale or offering for sale.²⁴⁸ But, as in the case of the offense discussed in the preceding section, proof of actual sales is not only admissible but strong evidence on the question of intent; that is, to show that such was the purpose for which the tenement kept by defendant was used.²⁴⁹ And the testimony of witnesses that they

²⁴² Comm. v. Powers, 123 Mass. 244.

²⁴³ Comm. v. Mead, 140 Mass. 300, 3 N. E. Rep. 39; Comm. v. Leighton, 140 Mass. 305, 6 N. E. Rep. 221. See, also, Comm. v. Lynch, 151 Mass. 358, 23 N. E. Rep. 1137; Comm. v. Patten, 151 Mass. 536, 25 N. E. Rep. 20; Comm. v. Ham, 150 Mass. 122, 22 N. E. Rep. 704.

²⁴⁴ Comm. v. Wallace, 123 Mass. 400.

²⁴⁵ Cobleigh v. McBride, 45 Iowa, 116.

²⁴⁶ Comm. v. Purdy, 147 Mass. 29, 16 N. E. Rep. 745.

²⁴⁷ Comm. v. Cummings, 121 Mass. 63.

²⁴⁸ Comm. v. Boyle, 145 Mass. 373, 14 N. E. Rep. 155.

²⁴⁹ Comm. v. Greenen, 11 Allen, 241. The indictment may be supported by evidence of sales of intoxicating liquor on Sunday, although the liquor is such that its sale on other days would not be

have seen liquor delivered in answer to calls for whisky and for ale is competent evidence, its weight being for the jury.²⁵⁰ It is also necessary to show that the defendant was the proprietor or keeper of the place in question. This may be made out by indirect or circumstantial evidence satisfactory to the jury.²⁵¹ Thus, a business card containing the defendant's name and address and the words "dealer in imported wines and liquors," and admitted to have been printed for him, is admissible in evidence.²⁵² And evidence that defendant had previously resided in the building, that he was seen there during the time the liquor was being sold, and that he had the building repaired a few months before, sufficiently connects him with the premises to render admissible a deed thereof made nine years before to a person of defendant's name and residence.²⁵³ An application for a liquor license is also admissible in evidence, as tending to show that the applicant kept the place, no change appearing.²⁵⁴ But the indictment is not sustained by proof that the owner of the premises made a written lease to another, knowing that the lessee intended to use them for unlawful liquor-selling, and that the lessee so used them.²⁵⁵ Nor is the evidence sufficient when it only shows that an occupant of the house and servants of the defendant sold liquor there.²⁵⁶ The fact of keeping liquors for sale is shown by the discovery of liquors on the premises, when accompanied with such evidence as has a legal tendency to prove the purpose of their being there. Indeed, it is ruled that the finding of intoxicating liquors in any other place than one used as a private dwelling affords presumptive evidence that they are kept by the owner for sale, and will support an indictment for keeping and maintaining a place for such sale.²⁵⁷ And in general, the finding of liquors at the place in question, especially if under

illegal. *Comm. v. McCurdy*, 109 Mass. 364. But such complaint, against a defendant licensed to sell liquor to be drunk on the premises, is not sustained by proof of a single sale to a minor when he was in company with two adults. *Comm. v. Hayes*, 150 Mass. 506, 23 N. E. Rep. 216.

²⁵⁰ *Comm. v. Aaron*, 114 Mass. 255.

²⁵¹ *Comm. v. Sisson*, 126 Mass. 48.

²⁵² *Comm. v. Twombly*, 119 Mass. 104.

²⁵³ *Comm. v. Mead*, (Mass.) 26 N. E. Rep. 855.

²⁵⁴ *Comm. v. Andrews*, 143 Mass. 23, 8 N. E. Rep. 643.

²⁵⁵ *Comm. v. Churchill*, 136 Mass. 148. See, also, *Comm. v. Locke*, 148 Mass. 125, 19 N. E. Rep. 24.

²⁵⁶ *Comm. v. Dunbar*, 9 Gray, 298.

²⁵⁷ *State v. Norton*, 41 Iowa, 430.

suspicious circumstances, the presence of the materials and implements for pursuing the traffic, the discovery of jugs, decanters, or glasses, evidences of recent drinking, attempts to hide away the liquor, when officers appear, or secretly to remove it from the building, are all competent and admissible evidence, the weight of which is to be appraised by the jury.²⁵⁸ As to the determination of the place alleged to have been so kept, it is held that an allegation of maintaining "a tenement in a building" used for the illegal sale of liquors, is supported by proof that the defendant so kept and used the cellar of his dwelling-house.²⁵⁹ And a charge of keeping "a certain tenement" is sustained by proof of keeping a whole building, using part only illegally, or of keeping a building consisting of only one room.²⁶⁰ But an indictment for keeping "a certain building" for such uses, is not sustained by proof of occupying and keeping one of several tenements in the same building.²⁶¹ It is said that a lot of land, with buildings detached but used together, constitutes but one tenement, for the purposes of such a prosecution.²⁶² But where the proof showed that the building occupied by defendant consisted only of a single room, but was joined to another structure on the same lot occupied by another person, it was held that the question whether defendant kept "a tenement in a building" was for the jury.²⁶³ In Massachusetts, where the statute prohibits the keeping of a tenement used for the illegal sale and illegal keeping for sale of intoxicating liquors, the indictment is supported by proof of keeping a tenement used for either purpose.²⁶⁴

²⁵⁸ *Comm. v. Kahlmeyer*, 124 Mass. 322; *Comm. v. Moore*, 147 Mass. 528, 18 N. E. Rep. 403; *Comm. v. Vahey*, 151 Mass. 57, 23 N. E. Rep. 659; *Comm. v. Lattinville*, (Mass.) 25 N. E. Rep. 972; *State v. Fertig*, 70 Iowa, 272, 30 N. W. Rep. 633; *State v. Illsley*, (Iowa,) 46 N. W. Rep. 977.

²⁵⁹ *Comm. v. Welch*, 2 Allen, 510; *O'Keefe v. State*, 24 Ohio St. 175.

²⁶⁰ *Comm. v. Godley*, 11 Gray, 454.

²⁶¹ *Comm. v. McCaughey*, 9 Gray, 296. See, also, *Comm. v. McArty*, 11 Gray,

456; *Comm. v. Buckley*, 147 Mass. 581, 18 N. E. Rep. 571; *Comm. v. Hersey*, 144 Mass. 297, 11 N. E. Rep. 116.

²⁶² *Comm. v. Patterson*, (Mass.) 26 N. E. Rep. 136.

²⁶³ *Comm. v. Lee*, 148 Mass. 8, 18 N. E. Rep. 586.

²⁶⁴ *Comm. v. Carolin*, 2 Allen, 169. But proof of keeping the place for the mere purpose of making illegal sales, without proof of an actual illegal keeping of liquors for sale, is not sufficient. *Comm. v. Welsh*, 1 Allen, 1.

§ 527. Evidence of Maintaining Nuisance.

An indictment for the maintenance of a common nuisance, by the keeping of a place for the illegal sale and keeping of liquors, is supported by evidence of unlawful sales of liquor by the defendant therein.²⁶⁵ But as the nuisance does not consist in the purpose or intention of the party to so use the premises, it is error to instruct the jury that if the defendant erected or used a building for the purpose and with the intent of owning, keeping, or selling intoxicating liquors therein, contrary to law, he would be guilty; because this would make punishable an unexecuted intention or an incomplete act.²⁶⁶ But a complaint for keeping and maintaining a liquor nuisance is supported by proof of a keeping on a single occasion.²⁶⁷ At common law, evidence of the general reputation of the place or tenement kept by the defendant is not admissible.²⁶⁸ But where, as in Rhode Island, the statute provides that the notorious character of the premises shall be evidence that such premises are a nuisance, it is competent for witnesses to testify concerning the reputation of the premises, and the talk of the people concerning the premises as a place where liquors are sold and kept for sale.²⁶⁹ As evidence tending to show the character of the place and the nature of the business carried on there, it is permissible to prove that intoxicated persons have been seen coming from the place.²⁷⁰ The locality of the alleged nuisance should be proved with certainty and as laid. But an indictment alleging that the defendant kept a tenement in N., is supported by proof that he maintained the nuisance in a house consisting of a single room, a small part of which was in W., a town adjoining N., and the remaining part in N., in which latter part the nuisance was maintained.²⁷¹ So, where an indictment charged that the defendant

²⁶⁵ *Comm. v. Farrand*, 12 Gray, 177.

²⁶⁶ *State v. Harris*, 27 Iowa, 429.

²⁶⁷ *Comm. v. Karrissey*, 141 Mass. 110,
4 N. E. Rep. 820.

²⁶⁸ *Comm. v. Eagan*, 151 Mass. 45, 23
N. E. Rep. 494.

²⁶⁹ *State v. Wilson*, 15 R. I. 180, 1 Atl.
Rep. 415. See *State v. Kingston*, 5 R.

I. 297; *State v. Spaulding*, 61 Vt. 505, 17
Atl. Rep. 844.

²⁷⁰ *Comm. v. Meaney*, 151 Mass. 55, 23
N. E. Rep. 730; *Comm. v. Gay*, (Mass.)
26 N. E. Rep. 571.

²⁷¹ *Comm. v. Hersey*, 144 Mass. 297, 11
N. E. Rep. 116.

used "a building on the north side of Main street next door west from Chamber's store, in Agency city," as a place for the keeping of intoxicating liquors, and the evidence showed that he kept such liquors at a place "next door west of Chamberlain's store," in the same town, it was held that the variance was not fatal.²⁷²

§ 528. Evidence on Prosecution of "Club."

In some of the states, in consequence of the abuses which followed the decision of the courts that *bona fide* social clubs were not required to take out a license to protect the sale or dispensing of liquors to their members, as a convenience incidental to the purposes of their organization, it has been found necessary to enact laws against associations formed for the very object of illicit keeping and sale of liquors, and fraudulently disguising their operations under the pretense of an organization for social or other purposes.²⁷³ On an indictment for the maintenance of such a concern, it need not be shown that the sole purpose of the club was to sell and distribute liquors; it is enough that that was one of the purposes for which the place was kept.²⁷⁴ The main fact, essential to bring the case within the statute, is the fact that the "club" was but a fraudulent device to cover the unlicensed sale of liquor. This fact may, and in the nature of the case usually must, be established by circumstantial evidence. It may be shown that no principle of selection was exercised in relation to its membership, that any person could become a member by paying a fee or buying tickets, that persons not members were supplied with liquor, that any social, literary, or other features attempted to be given to the association were but a sham, that its premises contained the ordinary fittings of a bar-room, that one person was in charge and apparently the proprietor of the place, and so on.²⁷⁵ And books and papers, relating to the business carried on in the rooms of the club, found on the premises where the accused could have seen

²⁷² State v. Verden, 24 Iowa, 126.

²⁷³ See, *supra*, § 142.

²⁷⁴ Comm. v. Jacobs, (Mass.) 25 N. E. Rep. 463.

²⁷⁵ Comm. v. Ryan, (Mass.) 25 N. E. Rep. 465; Comm. v. Jacobs, (Mass.) Id. 463. *Supra*, § 142.

them, are admissible evidence against him, it being shown that he had charge of the rooms and the business done there.²⁷⁶

§ 529. Proof of Sale of Liquor to be Drunk on Premises.

On the trial of an indictment for illegally selling liquor to be drunk on the premises where sold, it is not necessary to prove that the liquor alleged to have been sold was in fact drunk on the premises, although the indictment so alleges.²⁷⁷ But where, as in some states, the law applies only to sales made for the purpose of drinking in or about the seller's house, the place of sale is material to the offense. Thus, under such a statute, a conviction cannot be had where the evidence shows that the sales were not made at or near defendant's house, but from a wagon standing on the highway just outside the beaten track.²⁷⁸ Where the law forbids the sale of liquor at "a place of public resort," and a defendant, indicted thereunder, contends that the place where the liquor was drunk was his private dwelling, and not such a place as contemplated by the statute, a witness may be allowed to state that he went to defendant's house to get wine, because he expected to be able to get it there, having heard that other people got it there.²⁷⁹

§ 530. Proof of Illegal Transportation of Liquors.

On an indictment, under the statute, for transporting liquors from place to place, having reasonable cause to believe that they were intended for sale in violation of law, it is competent to show that the defendant, on several occasions within a short time, had received other considerable quantities of liquor, at the same railroad station, for transportation by him.²⁸⁰ And on the issue whether he had rea-

²⁷⁶ *Comm. v. Jacobs*, (Mass.) 25 N. E. Rep. 463.

²⁷⁷ *Comm. v. Luddy*, 143 Mass. 563, 10 N. E. Rep. 448. See *Gulick v. State*, 50 N. J. Law. 468, 14 Atl. Rep. 751.

²⁷⁸ *Schilling v. State*, 116 Ind. 200, 18 N. E. Rep. 682. See, also, *Compher v. State*, 18 Ind. 447.

²⁷⁹ *State v. Spaulding*, 61 Vt. 505, 17 Atl. Rep. 844.

²⁸⁰ *Comm. v. Commeskey*, 13 Allen, 585. See, also, *Comm. v. McConnell*, 11 Gray, 204; *Comm. v. Locke*, 114 Mass. 288.

sonable cause to believe that liquor conveyed by him to a house was intended for illegal sale, in the absence of proof of change in the use of the house, evidence is admissible that four months previously the place was used for selling intoxicating liquors.²⁸¹ But the defendant cannot introduce evidence that the person to whom the liquors were conveyed had been tried on a charge of keeping the same liquors with intent to sell, and had been acquitted.²⁸²

§ 531. Proof of Illegal Sale to Minor.

It has been stated generally that the burden of proving that those to whom liquor was sold were persons to whom, under his license, the defendant, prosecuted for selling, had a right to sell, is on him.²⁸³ But it is probable that, on an indictment for selling to a minor, the state should be required to adduce at least presumptive evidence of the fact of the minority of the purchaser. This fact may be proved in any of the ordinary methods. Thus, the minor himself may testify as to his age from an entry of his birth in the family bible, without producing it, or from any other source of information.²⁸⁴ Evidence that the purchaser of the liquor was nineteen in the year preceding that of the trial, is sufficient to show that he was a minor at the time of the sale.²⁸⁵ If the defendant seeks to justify under the written order or consent of the parent or guardian of the minor, as he may do in some states, the burden is upon him to prove this defense; it need not be negatived by the evidence for the prosecution.²⁸⁶ And if, under the decisions in the particular jurisdiction, he is allowed to excuse himself on the ground of an honest mistake as to the age of the purchaser, this also is affirmative matter of defense which the defendant must prove. And it is not permissible for the jury to look at the personal appearance of the alleged minor, who has testified as a witness in their presence, and to regard such

²⁸¹ *Comm. v. Kenney*, 115 Mass. 149.

²⁸² *Comm. v. Waters*, 11 Gray, 81.

²⁸³ *Comm. v. Towle*, 138 Mass. 490; *Comm. v. Barnes*, *Id.* 511.

²⁸⁴ *Edgar v. State*, 37 Ark. 219; *Pounders v. State*, *Id.* 899.

²⁸⁵ *Ehlert v. State*, 93 Ind. 76.

²⁸⁶ *Farrall v. State*, 32 Ala. 557; *Monroe v. People*, 113 Ill. 670; *Edgar v. State*, 37 Ark. 219; *Pounders v. State*, *Id.* 899; *Ridling v. State*, 56 Ga. 601.

inspection in determining whether or not the defendant acted in good faith in selling him the liquor.²⁸⁷

§ 532. Proof of Sale to Intoxicated Person.

On a prosecution for selling liquor to a person in a state of intoxication, the fact of the intoxication is to be proved by the prosecution. Whether or not a person was drunk at a given time, is a question on which any witness, who is competent to judge, may give his opinion.²⁸⁸ In a case where it appeared that a person came into the defendant's saloon, called for whisky, drank it, and paid for it, and that before that, on the same evening, he had been seen on the street drunk, it was held that there was sufficient evidence to support a finding that such person was in a state of intoxication at the time of the sale to him by the defendant.²⁸⁹ But, in such a case, the jury must consider the question whether he had regained soberness in the interval.²⁹⁰ It is not necessary to produce further evidence to show that the defendant was aware of the intoxicated condition of the purchaser. On proof that the latter was drunk, it will be presumed that the defendant knew that fact.²⁹¹

§ 533. Proof of Sale to Habitual Drunkard.

To convict for a violation of a statute prohibiting the sale of liquor to persons of intemperate habits, the indictment must allege and the proof must show that the person to whom the sale was made was, at about the date of the sale, a person having such habits.²⁹² But it is not essential to show that the party is constantly or usually intoxicated, but it is sufficient to prove that he has been frequently so, and has thereby acquired an involuntary tendency to become

²⁸⁷ *Stephenson v. State*, 28 Ind. 272; *Ibinger v. State*, 53 Ind. 251; *Robinius v. State*, 63 Ind. 235.

²⁸⁸ 1 Wharton, Ev. § 451, citing *State v. Pike*, 49 N. H. 399; *Gahagan v. R. Co.*, 1 Allen, 187; *People v. Eastwood*, 14 N. Y. 562; *Piers v. State*, 53 Ga. 365; *Stanley v. State*, 26 Ala. 26.

²⁸⁹ *Kammann v. People*, 124 Ill. 481, 16 N. E. Rep. 661.

²⁹⁰ *Kammann v. People*, 26 Ill. App. 48.

²⁹¹ *Brow v. State*, 103 Ind. 133, 2 N. E. Rep. 296.

²⁹² *Zeizer v. State*, 47 Ind. 129.

intoxicated.²⁹³ Evidence that the party had been drunk from three to five times within the two years preceding the trial has been held sufficient to authorize the jury to find that he was in the habit of becoming intoxicated.²⁹⁴ But clearly it cannot be stated, as a matter of law, that any particular number of instances of intoxication is necessary, or sufficient, to constitute the habit.²⁹⁵ The person to whom the sale was made is himself a competent witness to testify as to his intemperate habits.²⁹⁶ As to the other essential fact in prosecutions of this sort, whether the defendant had knowledge of the intemperate habits of the purchaser, this must be left to the decision of the jury upon the evidence; a charge assuming that such knowledge was brought home to him would be erroneous.²⁹⁷ While neither the sale of the liquor nor the intemperate habits of the person to whom the sale was made can be proved by general reputation or general notoriety in the community, yet such evidence is admissible to prove defendant's knowledge of the habits of such person, on the theory that what is generally known in the community is evidence to be weighed by the jury in determining whether it is known to the accused; but such evidence is not conclusive.²⁹⁸ All persons having sufficient knowledge of the person's general reputation are competent to testify as to whether he was generally known as a man of intemperate habits.²⁹⁹ And, to prove the seller's knowledge, the prosecution may show that the buyer was accustomed to drink, frequently and openly, to a state of intoxication, in the town in which the defendant lived, of liquor there obtained from the defendant and others.³⁰⁰

§ 534. Evidence of Violation of Local Option Law.

When a conviction is sought for a violation of the local option law, the authorities generally hold that it must be alleged and proved that

²⁹³ *Murphy v. People*, 90 Ill. 59; *Mapes v. People*, 69 Ill. 523. And see, *supra*, § 425.

²⁹⁴ *Murphy v. People*, 90 Ill. 59.

²⁹⁵ *Gallagher v. People*, 120 Ill. 179, 11 N. E. Rep. 335.

²⁹⁶ *Tatum v. State*, 63 Ala. 147.

²⁹⁷ *Elam v. State*, 25 Ala. 53.

²⁹⁸ *Tatum v. State*, 63 Ala. 147, *Stallings v. State*, 33 Ala. 425. Compare *Stanley v. State*, 26 Ala. 26.

²⁹⁹ *Tatum v. State*, 63 Ala. 147.

³⁰⁰ *Atkins v. State*, 60 Ala. 45.

the provisions of that law had been put in force in the particular county or district at the time of the commission of the alleged offense.³⁰¹ And in Texas, it is held to be essential to such conviction that it should appear that the forms of law were complied with in holding the election;³⁰² and the state must establish the fact that the order of the commissioners' court for the holding of the election was based upon a legal petition, and this proof must appear of record on appeal.³⁰³ But in some other states, the doctrine prevails that the court may take judicial notice of the adoption of the local option law, and consequently that it is not necessary for the prosecution to prove this fact, nor to show, in the first place, that the requisite formalities were observed.³⁰⁴ Where the state has a good indictment, but no proof, under the general law, and a bad indictment, but some proof, under the local option law, there can be no conviction.³⁰⁵

³⁰¹ *Bryant v. State*, 65 Miss. 435, 4 South. Rep. 343; *Butler v. State*, 25 Fla. 347, 6 South. Rep. 67; *Donaldson v. State*, 15 Tex. App. 25. *Supra*, § 102.

³⁰² *McMillan v. State*, 18 Tex. App. 375.

³⁰³ *Carnes v. State*, 23 Tex. App. 449, 5 S. W. Rep. 133.

³⁰⁴ *Rauch v. Comm.*, 78 Pa. St. 490; *Combs v. State*, 81 Ga. 780, 8 S. E. Rep. 318; *Young v. Comm.*, 14 Bush, 161. *Supra*, § 102.

³⁰⁵ *Norton v. State*, 65 Miss. 297, 3 South. Rep. 665.

CHAPTER XXI.

PROCEDURE IN LIQUOR CASES.

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§ 535. Jurisdiction.

In some of the states, the jurisdiction for the trial of offenses against the liquor laws is vested in the police courts, justices of the peace, or other inferior magistrates; in others, it is conferred upon the county, district, or superior courts. When the statute expressly points out the form of proceeding to be followed or the tribunal to exercise jurisdiction, its provisions are exclusive, and no other court can assume jurisdiction and hold a legal trial. For instance, where a statute provides that one selling liquor within a certain territory shall be punished "upon conviction thereof before any acting justice of the peace," the superior court of that county does not have original jurisdiction of the offense.¹ But if the assignment of jurisdiction is

¹State v. Patterson, (N. Car.) 4 S. E. Rep. 45. See, also, Comm. v. Murphy, 11 Gray, 53.

not made in the statute creating the offense, it must then be determined by reference to the general laws distributing the criminal jurisdiction among the courts composing the system of tribunals in the particular state. And this sometimes gives rise to questions of considerable difficulty. Thus, in Rhode Island, the district courts have jurisdiction of all offenses "punishable by fine not exceeding twenty dollars *or* by imprisonment not exceeding three months." The statute prohibiting the unlawful selling of liquor prescribes, as a punishment, a fine of twenty dollars *and* imprisonment for ten days. It is held that the district courts have jurisdiction.² In Michigan, proceedings for a violation of the liquor law are not criminal proceedings, and the statutory provision as to the general criminal jurisdiction of justices does not operate as a limit to their jurisdiction as expressly given under the liquor law; and the jurisdiction conferred is within constitutional limits.³ The court within the territorial jurisdiction of which an illegal sale of liquor is made has jurisdiction of the offense, in accordance with well settled general principles, although the residence of the defendant may be beyond that district.⁴ In Iowa, it is held that the provision of the code, that when a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either of the counties, applies to a criminal prosecution for keeping a liquor nuisance.⁵ And, under the same statute, where orders for intoxicating liquor, subject to approval, were taken in one county, and approved in another, and then delivered in the first county, jurisdiction of the offense is in either county.⁶ Various other decisions, relative to the jurisdiction under the liquor laws, in the several states, will be found collected in the margin.⁷

² State v. Nolan, 15 R. I. 529, 10 Atl. Rep. 481. And see Comm. v. Carr, 11 Gray, 468.

³ Matter of Buddington, 29 Mich. 472.

⁴ Comm. v. Hersey, (Mass.) 9 N. E. Rep. 837.

⁵ State v. Rockwell, (Iowa,) 48 N. W. Rep. 721.

⁶ State v. Kriechbaum, (Iowa,) 47 N. W. Rep. 872.

⁷ See Osborn v. Sargent, 23 Me. 527; State v. Stinson, 17 Me. 154; State v. Peck, 32 Vt. 172; Morrill v. Thurston, 46 Vt. 732; Hale v. State, 15 Conn. 242; Comm. v. Murray, 144 Mass. 170, 10 N. E. Rep. 802; Comm. v. Carney, (Mass.) 27 N. E. Rep. 9; Durr v. Comm., (Pa. Sup.) 12 Atl. Rep. 507; Eckhart v. State, 5 W. Va. 515; State v. Hollingsworth, 100 N. Car. 535, 6 S. E. Rep. 417; Ham-

§ 536. Limitation of Actions.

The period within which prosecutions for the violation of the liquor laws will be limited by law, if not prescribed in the statute creating the offense, must be sought in the general law relating to the time of instituting criminal proceedings. Thus, in Florida, a statute provides that all offenses not punishable by death shall be prosecuted within two years. It is held that this applies to the offense of selling spirituous liquors without a license.⁸ But in some cases, the same act may, really or apparently, amount to a violation of two statutes, having different periods of limitation. And in that case, the question must be determined by reference to the law under which a conviction is sought. For instance, in one state, it is said that a sale of liquor on Sunday, in violation of the statute in that behalf, is not merely a "desecration of the Sabbath," for which a prosecution must be commenced within six months after the offense; a prosecution for such unlawful sale is not barred until after the expiration of two years.⁹ In New Hampshire, an indictment for selling liquors without license is not barred by the statute limiting prosecutions on penal statutes.¹⁰

§ 537. Effect of Repeal of Statute.

When a later statute repeals a prior liquor law, if it expressly reserves rights accrued under the repealed law as to any offenses committed against such law, or as to any act done or punishment incurred thereunder, the repeal will not affect the right to prosecute for penalties incurred under the earlier law; but if the repealing act contains no provision saving prosecutions pending at the time of its passage, a judgment rendered in such an action, for a violation of the previous law, is without foundation, even if rendered on a plea

ilton v. Carthage, 24 Ill. 22; State v. Arlen, 71 Iowa, 216, 32 N. W. Rep. 267; People v. Schottey, 66 Mich. 708, 33 N. W. Rep. 810; People v. Haas, 79 Mich. 449, 44 N. W. Rep. 928; Boldt v. State, 72 Wis. 7, 38 N. W. Rep. 177; State v. Bach, 36 Minn. 234, 30 N. W. Rep. 764.

⁸ Frese v. State, 23 Fla. 267, 2 South. Rep. 1. And see Patton v. State, 80 Ga. 714, 6 S. E. Rep. 273; State v. Pfefferle, 36 Kans. 90, 12 Pac. Rep. 406.

⁹ Shepler v. State, 114 Ind. 194, 16 N. E. Rep. 521.

¹⁰ State v. Rundlett, 33 N. H. 70.

of guilty.¹¹ But if the repealing act provides that its terms shall not take effect until a certain future date, the former law remains in force until that date; and therefore a prosecution under the previous law, begun before that date, though after the passage of the repealing act, is well brought.¹²

§ 538. Form of Proceeding.

Whatever form of proceeding, principal or collateral, the statute may prescribe for the prosecution of offenses against the liquor laws must be exactly followed, or the judgment or sentence will have no legal foundation. To illustrate,—where the law provides that “when-ever a default shall be had of any recognizance arising under this act, *scire facias* shall be issued,” it is irregular to sue on such a recognizance in an action of contract.¹³ In some of the states, the penalties imposed upon those who violate the liquor laws, are to be recovered by a civil action; as, by a suit for the collection of the prescribed fine,¹⁴ or by a proceeding in the civil courts, founded on application or remonstrance, for the revocation of the offender’s license.¹⁵ In others, the proceedings are had before a justice of the peace or a police court, and are summary in their character. But in most of the states, infractions of the liquor laws are regarded as crimes of such a grade that they are to be prosecuted by indictment or presentment of a grand jury.¹⁶ Even where the act provides that the offender “shall forfeit and pay for every such offense” a designated sum of money, it is held that he may be punished by indictment.¹⁷ And although the unlicensed sale of liquors may not be among the offenses specifically declared to be misdemeanors, it is still a crime

¹¹ *Whitehurst v. State*, 43 Ind. 473; *Mullinix v. People*, 76 Ill. 211; *Boone v. State*, 12 Tex. App. 184; *Teague v. State*, 39 Miss. 516. See, also, *State v. Reynolds*, 74 Iowa, 499, 38 N. W. Rep. 377.

¹² *Leyner v. State*, 8 Ind. 490.

¹³ *Comm. v. Thompson*, 2 Gray, 82.

¹⁴ *McCracken v. State*, 71 Md. 150, 17 Atl. Rep. 932. See *State v. Koehler*, 6 Iowa, 398; *State v. Shawbeck*, 7 Iowa, 322.

¹⁵ *Downs v. State*, 19 Md. 571.

¹⁶ *State v. Hollin*, 12 La. Ann. 677; *Tefft v. Comm.*, 8 Leigh, 721; *Haines v. State*, 7 Tex. App. 30; *Harper v. State*, 7 Ohio St. 73; *State v. Schilling*, 14 Iowa, 455; *State v. Kobe*, 26 Minn. 148, 1 N. W. Rep. 1054; *People v. Hart*, 1 Mich. 467.

¹⁷ *State v. Sinnot*, 15 Nebr. 472, 19 N. W. Rep. 613.

punishable by indictment.¹⁸ In Tennessee, it is held that the grand jury may make a legal presentment upon the information of witnesses, brought before them upon *subpoena* issued at their instance.¹⁹

§ 539. Who may Institute Proceedings.

In some jurisdictions, prosecutions for violations of the liquor law are required to be conducted in the name of the state.²⁰ In some other states, the law provides for the institution of proceedings by certain officials. Such a provision, however, is not necessarily exclusive of the right of all others to set the law in motion against the offender. Thus, in Massachusetts, it is enacted that "the mayor and aldermen of cities, and the selectmen of towns, shall prosecute to final judgment all violations" of the acts relating to offenses against the liquor laws. But it is held that this is merely directory, and does not exclude the right of any other citizen to enter the complaint.²¹ So, where the statute punishing the maintenance of a liquor nuisance by a fine, does not provide that the fine shall be paid to the town where the offense was committed, the complaint need not necessarily be made by the town treasurer, but is good if presented by a private individual.²² In New York, it is held that the duties of the board of excise, appointed to regulate the liquor traffic, require such discretion, and involve such a degree of trust and confidence, that they cannot be delegated to a third person; and hence an attorney cannot be clothed with a general authority to bring such suits for violations of the law as he may see fit.²³ Where, by statute, the mayor and aldermen are required to institute proceedings, on being informed of the commission of an offense and being furnished with proof, it is held that their being furnished with proof is not a preliminary necessary to be shown in evidence as the basis of the authority of the prosecutor to bring the suit.²⁴

¹⁸ *People v. Charbineau*, 115 N. Y. 433, 22 N. E. Rep. 271.

¹⁹ *Glenn v. State*, 1 Swan, 19.

²⁰ *Rogers v. Alexander*, 2 Greene, (Iowa.) 443.

²¹ *Comm. v. Murphy*, 147 Mass. 577, 18 N. E. Rep. 418.

²² *Comm. v. Gay*, (Mass.) 26 N. E. Rep. 852.

²³ *Board of Excise v. Sackrider*, 35 N. Y. 154.

²⁴ *Portland v. Rolfe*, 37 Me. 400.

§ 540. Preliminary Proceedings.

When the proceedings before the inferior court or committing magistrate are required to be based on or supported by an affidavit of the prosecutor, the affidavit should be sufficiently full and explicit to charge the commission of an offense, though it will in general be held good if it contains all the averments which the statute prescribes.²⁵ When the record, on appeal, shows that the affidavit on which the prosecution was based was sworn to, the omission of the magistrate's seal to the jurat is not ground for reversal.²⁶ If the statute provides that the magistrate shall, "if he finds the complaint to be true," recognize the defendant to appear, it need not be expressly stated in the record that he found the complaint to be true.²⁷ The recognizance must be taken to the person whom the law designates for that purpose. If taken to the treasurer of the county, when the law intends that it shall be taken to the state treasurer, no action can be maintained upon it.²⁸ Under the laws against the adulteration of liquors, requiring their inspection by an officer duly appointed for that purpose, the appointment of such inspector is a necessary preliminary to any possible criminal proceedings, and before such appointment, no violation of those laws will found a valid prosecution.²⁹

§ 541. Warrant or Summons.

The ordinary rules relative to the sufficiency of criminal process, and the time and manner of objecting thereto, will be found applicable in proceedings under the liquor laws. Thus, if the defendant enters into a recognizance for his appearance at court, or if he appears there and makes his defense, without making any objection, he thereby waives any supposed defects or irregularities in the pro-

²⁵ O'Connor v. State, 45 Ind. 347; Farrell v. State, Id. 371; Hosea v. State, 47 Ind. 180.

²⁶ Qualter v. State, 120 Ind. 92, 22 N. E. Rep. 100. See, also, People v. Haas, 79 Mich. 449, 44 N. W. Rep. 923.

²⁷ Scovern v. State, 6 Ohio St. 288.

²⁸ Chittenden County Treas'r v. Mitchell, 23 Vt. 131.

²⁹ Attorney General v. Lawton, 30 Mich. 386.

cess, or in its issuance, or in the manner of its service, and he cannot afterwards, for such reasons, and upon motion, have the process quashed or set aside.³⁰

§ 542. Defendant's Plea.

In prosecutions under the liquor law, the plea of "not guilty" is the general issue, and puts in issue every material fact.³¹ A special plea, when it merely states matters of justification, or such as would constitute a defense on the merits, may properly be stricken out, for such matters would be admissible in evidence under the general issue.³² Under the practice in Massachusetts, it is held that a defendant, in such a prosecution, cannot be adjudged guilty on a plea of *nolo contendere*, unless it appears by the record that the plea was received with the consent of the prosecutor.³³ But where the first of two counts in an indictment charged the defendant with having been a common seller of intoxicating liquors during a certain time, and the second alleged a single sale within the same time, and the defendant pleaded guilty to the second and not guilty to the first count, it was held that he might nevertheless be tried and convicted upon the first count, and judgment rendered thereon against him, and a *nolle prosequi* entered on the second count.³⁴

§ 543. Specification of Offenses.

In Vermont, under the practice obtaining in that state, in prosecutions under the liquor law, the accused is entitled to a specification of the offenses for which the government claims a conviction.³⁵ But the character of this specification, with reference to its extent and minuteness, is a matter for the discretion of the trial court, to be exercised according to the circumstances of the case.³⁶ And it is in

³⁰ State v. Langton, 35 Kans. 375, 11 Pac. Rep. 163; Mayson v. City of Atlanta, 77 Ga. 662.

³¹ Plainfield v. Batchelder, 44 Vt. 9.

³² Trost v. State, 64 Miss. 188, 1 South. Rep. 49.

³³ Comm. v. Adams, 6 Gray, 359.

³⁴ Comm. v. Mead, 10 Allen, 396.

³⁵ State v. Rowe, 43 Vt. 265.

³⁶ State v. Wooley, 59 Vt. 357, 10 Atl. Rep. 84; State v. Bacon, 41 Vt. 526, 95 Am. Dec. 616.

the discretion of the court to allow offenses specified to be proved by other witnesses than those named in the specifications.³⁷

§ 544. Election between Offenses.

A defendant may be convicted of three or more separate sales of liquor on several counts in the same indictment, although the same testimony would have convicted him of the offense of being a common seller.³⁸ And after a general verdict of guilty on an indictment containing a count charging the defendant with being a common seller during a certain period, and counts for single sales within the time covered by the first count, a *nolle prosequi* may be entered on all the counts except the first, and judgment rendered upon that for the state.³⁹ But where the indictment charges the defendant with retailing merely, he cannot be convicted of keeping a tippling-house, which is a different offense.⁴⁰ But one indicted for a second or third offense of selling liquors may be convicted of a first offense, as the one is necessarily included in the other.⁴¹ Under an indictment for a single sale of liquor, where evidence of more than one offense is introduced, the court should, on motion, require the prosecution to elect on which offense it will try the defendant.⁴² Thus, each sale of liquor on a forbidden day, although made to the same person, constituting a distinct offense, where the indictment contains a single count, and the evidence shows two sales, at different times on the same day, the prosecution will be required to make an election.⁴³ So, where an indictment against a physician for giving fraudulent prescriptions

³⁷ State v. Smith, 55 Vt. 57.

³⁸ Comm. v. Tuttle, 12 Cush. 505.

³⁹ Comm. v. Jenks, 1 Gray, 490. A common seller of liquors may be indicted and convicted at the same term upon two indictments covering successive periods of time, the last of which expired before the finding of either indictment. Comm. v. Cain, 14 Gray, 9. But a complaint for maintaining a tenement for the illegal sale of liquors, and a separate complaint for unlawfully selling such liquors, cannot be

tried together, against the defendant's objection, though both charges might have been joined in one complaint. Comm. v. Bickum, (Mass.) 26 N. E. Rep. 1003.

⁴⁰ Robinson v. Comm., 6 Dana, 287.

⁴¹ State v. Gaffeny, 66 Iowa, 262, 23 N. W. Rep. 659; State v. Ensley, 10 Iowa, 149.

⁴² Murphy v. State, 9 Lea, 373; Comm. v. O'Hanlon, (Mass.) 29 N. E. Rep. 518.

⁴³ Lebkovitz v. State, 113 Ind. 26, 14 N. E. Rep. 363.

for liquor is in several counts, each of which charges the giving of a prescription to a different person, the state may be compelled to elect on which count it will proceed.⁴⁴ But the fact that defendant, in a complaint charging the keeping of a nuisance in a certain "tenement," occupied one room in a house, does not require the state to elect in which one of the rooms was the tenement.⁴⁵ The prosecuting attorney, in making his election, must designate the acts intended to be relied on with sufficient definiteness to enable it to be understood.⁴⁶ But he may interrogate a witness far enough to identify the particular sale to which his testimony would relate, without thereby signifying an election to prosecute for that particular sale.⁴⁷ When the law provides that the granting of a new trial shall place the parties in the same position as if no trial had been had, the prosecution, on such new trial, may elect to proceed upon a different sale from that on which it elected to rely in the former trial.⁴⁸

§ 545. Trial by Jury.

In some of the states, the doctrine prevails that the constitutional provisions in relation to trial by jury have reference to that class of criminal offenses usually denominated "high crimes," the punishment of which affects life, liberty, or reputation, and have no application to those minor offenses which clearly concern the regulation of the internal police of the state. Hence the legislature may constitutionally provide that the minor offenses punishable by fine only, or by imprisonment in the local jail for a brief period, and having reference to the public police, may be tried upon informal or merely oral complaints, or by a jury of six men, or without any jury.⁴⁹ But in some other states, either because the constitutional guaranty is so expressed as to admit of no exception, or because of the ancient

⁴⁴ *State v. Farmer*, 104 N. Car. 887, 10 S. E. Rep. 568.

⁴⁵ *Comm. v. Clynes*, 150 Mass. 71, 22 N. E. Rep. 436. And see *Elam v. State*, 26 Ala. 48.

⁴⁶ *State v. Guettler*, 34 Kans. 582, 9 Pac. Rep. 200.

⁴⁷ *Hughes v. State*, 35 Ala. 351.

⁴⁸ *State v. Dow*, 74 Iowa, 141, 37 N. W. Rep. 114.

⁴⁹ *State v. Conlin*, 27 Vt. 318; *In re Dougherty*, Id. 325; *State v. Freeman*, Id. 523; *State v. Comstock*, Id. 553; *Floyd v. Comm'rs of Eatonton*, 14 Ga. 354.

and established usage in that regard, it is held that a trial by jury is claimable as a matter of right in prosecutions under the liquor laws.⁵⁰ This point was more fully discussed in an earlier section, to which the reader is herewith referred.⁵¹

§ 546. Competency of Jurors.

In a case in Massachusetts, a member of the "law and order league" (a voluntary association formed for the enforcement of the law against the illegal sale of intoxicating liquors and the prosecution of liquor-sellers) was held not competent to sit as a juror upon the trial of a complaint charging the defendant with maintaining a liquor nuisance, where the complainant was an agent of the league and employed by it to carry out its purposes.⁵² But in another state, where the person offered as a juror was a member of an organization called the "Good Templars," and he testified that he did not understand the object of the organization to be the enforcement of the liquor law among others, but to promote temperance among its members by moral suasion, it was considered that this did not show him to be incompetent as a juror.⁵³ And the fact that one, as constable, is specially charged with enforcing the liquor law, does not disqualify him from acting as a juror on a trial for maintaining a liquor nuisance in another precinct.⁵⁴

§ 547. Verdict.

On a indictment charging in one count a sale of liquor to a prohibited person, and in another a gift, a general verdict of guilty is sufficient, though based on proof of a single transaction.⁵⁵ And where, on an indictment charging, in two counts, selling liquor to a minor

⁵⁰ *People v. Baird*, 11 Hun, 289; Comm. v. Saal, 10 Phila. 496.

⁵¹ *Supra*, § 62. And see *Eilenbecker v. District Court*, 134 U. S. 31, 10 Sup. Ct. Rep. 424; *In re Liquors of McSoley*, 15 R. I. 608, 10 Atl. Rep. 659.

⁵² *Comm. v. Moore*, 143 Mass. 136, 9 N. E. Rep. 25.

⁵³ *State v. Estlinbaum*, (Kans.) 27 Pac. Rep. 996.

⁵⁴ *State v. Cosgrove*, (R. I.) 16 Atl. Rep. 900.

⁵⁵ *Brugier v. United States*, 1 Dak. 5, 46 N. W. Rep. 502.

and selling liquor without license, there is a general verdict of guilty, but the court, on motion for a new trial, finds that the second count is not sustained, while the first is, and sentences defendant on that only, defendant cannot complain that the verdict is broader than was warranted by the evidence.⁵⁶ Where the prosecution is for the unlicensed or unauthorized sale of liquors, a special verdict "that the sale was made as set forth in the complaint," or "that the defendant made the sale as set forth in the complaint," is not sufficient to warrant a judgment against him, because it does not show that the sale was unauthorized.⁵⁷ So where the indictment, for the unlawful keeping of liquors, alleged, in separate counts, that they were kept in defendant's shop, in the back room, and in the premises connected with the shop, a verdict of "guilty of having liquor in the back room" was held bad.⁵⁸ Nor is the court authorized to enter a verdict of guilty against one indicted for keeping a nuisance consisting of a tippling-shop, when three of the jury, upon being polled, refuse to concur in such verdict, but answer "guilty of keeping a bar there."⁵⁹ Upon an indictment against two for the illegal keeping of intoxicating liquors in a tenement "by them used" for such purpose, one may be convicted and the other acquitted.⁶⁰

§ 548. Sentence and Punishment.

When the statute specifies the amount of fine, or term of imprisonment, to be imposed as a penalty for a violation of the liquor laws, the court has no discretion in regard to the punishment, but must enter the sentence directed by the statute.⁶¹ Thus, where the statute

⁵⁶ *Jones v. State*, 67 Miss. 111, 7 South. Rep. 220.

⁵⁷ *Comm. v. Dooly*, 6 Gray, 360. Compare *Comm. v. Certain Intoxicating Liquors*, 148 Mass. 124, 19 N. E. Rep. 23.

⁵⁸ *Weikman v. City Council*, 2 Speers, 371. See *State v. Wissenhunst*, 98 N. Car. 682, 4 S. E. Rep. 533.

⁵⁹ *State v. Wright*, 5 R. I. 287.

⁶⁰ *Comm. v. Gavin*, 148 Mass. 449, 19 N. E. Rep. 554.

⁶¹ *Johnson v. People*, Breese, 276;

Morris v. People, 2 Thomp. & C. 219. See *People v. Brown*, (Mich.) 48 N. W. Rep. 158. Where, on an indictment for selling liquor on Sunday, under Code Or. § 1909, which imposes a fine of from \$10 to \$25, the defendant pleads guilty, he cannot be sentenced under Sess. Laws Or. 1889, p. 9, § 3, which fixes the penalty at \$150. *State v. Combs*, 19 Oreg. 295, 24 Pac. Rep. 235. On a trial for a violation of the local option law, in a county which adopted it before the

makes the minimum fine for each unlawful sale \$100, a person convicted on seven counts of an indictment for as many sales must be fined at least \$700, and there is no power in the court to reduce the amount.⁶² In Texas, the minimum fine for pursuing, without a license, any occupation taxed by law, is an amount not less than the tax so due; by another statute, the taxes on the occupation of a liquor-dealer cannot be for less than a year; hence the minimum punishment for pursuing the occupation of a liquor-dealer without a license is a fine equal to the amount of one year's tax.⁶³ Where one factor in the penalty is a county occupation-tax, not fixed by general law, but levied by the county commissioners, the amount of such a levy is not a matter of judicial knowledge, but should be alleged and proved, so that the fine may be assessed within the statutory limits.⁶⁴ And a defendant convicted of unlawful selling cannot be discharged by the court, with directions that execution for the fine and costs issue against his property.⁶⁵ If the statute does not authorize punishment by imprisonment, for offenses against the liquor laws, only a fine can be imposed.⁶⁶ Otherwise, where the law allows a judgment of "fine or imprisonment, or both, as the case may require."⁶⁷ When the statute provides that, on conviction for an illegal sale of liquor, the offender shall be punished by a fine and imprisonment, and in case the fine shall not have been paid when the imprisonment expires, he shall be further detained until the fine is fully paid, this contemplates an immediate imprisonment with or without payment of fine; and hence a sentence imposing a fine, and imprisonment in default of payment, cannot be complained of by the offender, being lighter than it might have been.⁶⁸ Where the statute provides one penalty

passage of an amending act, it is error to charge the penalties prescribed by that act, though the offense was committed, and the trial had, after its passage. *Robinson v. State*, 26 Tex. App. 82, 9 S. W. Rep. 61.

⁶² *State v. Faber*, 28 Nebr. 803, 44 N. W. Rep. 1187.

⁶³ *Davidson v. State*, 27 Tex. App. 262, 11 S. W. Rep. 371.

⁶⁴ *Spears v. State*, 8 Tex. App. 467;

White v. State, 11 Tex. App. 476; *Allen v. State*, (Tex. App.) 13 S. W. Rep. 998.

⁶⁵ *State v. Robinson*, 17 N. H. 263.

⁶⁶ *Van Noy v. State*, 14 Tex. App. 69; *Akin v. State*, Id. 142; *People v. Cowles*, 16 Hun, 577.

⁶⁷ *People v. Henschel*, (Sup.) 12 N. Y. Supp. 46.

⁶⁸ *People v. Rouse*, 72 Mich. 59, 40 N. W. Rep. 57. See *State v. Hicks*, 101 N. Car. 747, 7 S. E. Rep. 707.

for any person selling liquor on Sunday, and a severer penalty for any keeper of a dram-shop selling on that day, under an indictment for selling as a keeper of a dram-shop, and proof of a sale, but not of defendant's keeping a dram-shop, the lesser penalty may be imposed.⁶⁹ But where the statute provides a lighter punishment, for a given sale, for a person who is licensed to sell than for one who is not, the fact that the defendant was licensed does not entitle him to the lighter punishment, when he sold not for himself, but as agent for another who had no license.⁷⁰ The punishments to be inflicted for violations of the liquor laws will of course come within the constitutional provision that "excessive fines shall not be imposed." In this connection it has been ruled that a fine imposed for selling liquor without a license, of at least double the amount required for the license, is not an excessive punishment.⁷¹ Where the measure of the penalty is confided to the discretion of the court, regard should be had to the gravity of the case at bar, the general terms and policy of the statute, and the precedents in the particular jurisdiction. Some illustrations of punishments which have been approved on appeal may be useful in this place. In Missouri, for a violation of the local option law, a fine of \$300 and imprisonment for a year has been held not excessive.⁷² In Florida, where the penalty was to be not less than double the amount of the license fee, such fee being \$300, a fine of \$900 was held proper.⁷³ In Iowa, a fine of \$400 for maintaining a liquor nuisance was sustained on appeal.⁷⁴ In the same state, on a plea of guilty to an indictment for keeping and owning liquors with intent to sell, a fine of \$300 and costs, or, in default of payment, imprisonment at hard labor for 102 days, with an order for the destruction of the liquors, and a sale of the property used in the business, was held a proper sentence.⁷⁵ So, where the evidence shows that defendant had made some fifty or sixty illegal sales of

⁶⁹ State v. Heckler, 81 Mo. 417.

⁷⁰ Comm. v. Zelt, 138 Pa. St. 615, 21 Atl. Rep. 7.

⁷¹ Frese v. State, 23 Fla. 267, 2 South. Rep. 1.

⁷² *Ex parte* Swann, 96 Mo. 44, 9 S. W. Rep. 10.

⁷³ Baemel v. State, (Fla.) 7 South. Rep. 371.

⁷⁴ State v. Fertig, 70 Iowa, 272, 30 N. W. Rep. 633.

⁷⁵ State v. Baker, 74 Iowa, 760, 38 N. W. Rep. 380.

liquor, a fine of \$500 is not excessive.⁷⁶ And the same fine was approved as against a druggist who had, for three years, habitually sold liquors in violation of the statute.⁷⁷

§ 549. Separate Sentences on Separate Counts.

Under an indictment charging several violations of the liquor law in as many counts, where the defendant is found guilty on all, a separate sentence should be rendered on each count.⁷⁸ Thus, where a defendant was convicted on two counts of an indictment for selling liquor to an inebriate, the punishment being ten days' imprisonment for each offense, it was held to be error to render judgment of imprisonment for twenty days in gross; the imprisonment awarded should be for a specified time under each count, the time under the second to commence when the first ends.⁷⁹ But a judgment—"Therefore it is considered that the state of Iowa recover of said defendant ten dollars for the first offense, ten dollars for the second, and ten dollars for the third offense named in said indictment, and that he stand committed until said fine and costs are paid"—sufficiently complies with a statutory requirement of a separate judgment in each instance in which a verdict of guilty is found.⁸⁰ But a fine for two offenses in selling spirituous liquors without license, though proved, cannot be imposed where only one is charged.⁸¹

§ 550. Sentencing Joint Offenders.

Two or more persons may be jointly indicted for a violation of the liquor law, and in such case, if they are both found guilty, the full punishment may be imposed on each.⁸² The judgment should be several against each for the full penalty.⁸³ In Alabama, however, it

⁷⁶ *State v. Huff*, 76 Iowa, 200, 40 N. W. Rep. 720.

⁷⁷ *State v. Little*, 42 Iowa, 51.

⁷⁸ *State v. Leis*, 11 Iowa, 416; *Kroer v. People*, 78 Ill. 294; *Fletcher v. People*, 81 Ill. 116.

⁷⁹ *Mullinix v. People*, 76 Ill. 211; *Johnson v. People*, 88 Ill. 431.

⁸⁰ *Wrocklege v. State*, 1 Iowa, 167.

⁸¹ *Bridgeford v. Lexington*, 7 B. Mon. 47.

⁸² *People v. Sweetser*, 1 Dak. 308, 46 N. W. Rep. 452; *Comm. v. Tower*, 8 Metc. (Mass.) 527; *Comm. v. Sloan*, 4 Cush. 52; *Comm. v. Brown*, 12 Gray, 135.

⁸³ *People v. Walbaum*, 1 Dak. 308, 46

is said that when two persons are jointly indicted for carrying on the business of retailing spirituous liquors without a license, a joint fine may be assessed against them, if they acted as a firm in carrying on the business, or a separate fine against each, if they acted individually.⁸⁴

§ 551. Increased Penalty for Second Offense.

In many of the states, the statutes provide a more severe punishment to be imposed upon the offender when he is convicted of a second offense against the liquor laws. As a rule, however, these statutes do not authorize the imposition of the increased penalty for a second offense, unless the fact that the crime charged is a second offense is alleged in the complaint or indictment.⁸⁵ And where the defendant has excepted to the rulings of the trial court, and the exceptions are overruled by the supreme court, records of former convictions of the defendant for similar offenses are not available in the supreme court to increase the severity of the sentence, unless it appears that such records have been presented and proved upon the trial in the court below.⁸⁶ Under a statute prohibiting the selling, furnishing, or giving away of intoxicating liquor, a conviction for selling is available to increase the penalty on a subsequent conviction of the same defendant for furnishing.⁸⁷

§ 552. Informer's Share of Penalty.

The constitutional authority of the executive to remit penalties imposed for violations of the liquor laws does not extend to the share given, by statute, to the informer, and vested in him by the conviction.⁸⁸ In New Hampshire, a complainant who causes a prosecution for a violation of the liquor law to be instituted and carried on without any expense to the county or state, is entitled to one-half of the

N. W. Rep. 452; Comm. v. Harris, 7 Gratt. 600.

⁸⁴ Lemons v. State, 50 Ala. 130.

⁸⁵ Garvey v. Comm., 8 Gray, 382; Norton v. State, 65 Miss. 297, 3 South. Rep. 665.

⁸⁶ State v. Haynes, 35 Vt. 570.

⁸⁷ State v. Haynes, 36 Vt. 667.

⁸⁸ State v. Williams, 1 Nott & M. 26.

See, also, United States v. Harris, 1 Abb. (U. S.) 110.

fine collected through such prosecution, notwithstanding the fact that witnesses summoned by the solicitor, at the expense of the county, to testify in other cases, testified also before the grand jury in the case upon which the private prosecutor's complaint was founded.⁸⁹

§ 553. Double Penalties.

In a suit by a city, to recover the penalty fixed by ordinance for selling liquors contrary to the terms of defendant's license, it is no defense that he is liable to the city on his license bond for the same act, the ordinance prescribing that the penalties thereby imposed might be recovered in an action of debt, or as damages in a suit on the bond; the fact that the acts complained of were breaches of the bond makes them none the less violations of the ordinance.⁹⁰ And the fact that defendant may be liable to pay damages, at the suit of a third person, for injuries resulting from an unlawful sale of liquor, will not relieve him from the penalties imposed by law for such sale considered as a public offense.⁹¹

§ 554. Lien of Fine on Homestead.

In Iowa, the code provides that the property occupied and used for the sale of liquor, with the consent and knowledge of the owner, shall be liable for all fines and costs imposed for violations of the liquor law. It is held that this is a "special declaration" within the meaning of another section of the code, declaring the homestead exempt "where there is no special declaration of the statute to the contrary." And where the husband owns the homestead, his consent to its use for such purpose subjects it to liability. But the wife, to protect her homestead right, may intervene in the action against the husband to subject the homestead to the lien, and her petition need not allege that the husband refuses to assert the exemption.⁹²

⁸⁹ *Pierce v. Hillsborough Co.*, 57 N. H. 324.

⁹⁰ *Whalin v. Macomb*, 76 Ill. 49.

⁹¹ See *Mulcahy v. Givens*, 115 Ind. 286, 17 N. E. Rep. 598.

⁹² *McClure v. Braniff*, 75 Iowa, 38, 39 N. W. Rep. 171.

§ 555. Bar by Former Conviction or Acquittal.

In order to bar a prosecution for a violation of the liquor laws, it is not sufficient for the defendant to show that he has been indicted, and either acquitted or convicted, since the date of the offense now proved against him. He must prove that the former conviction or acquittal was for the *same offense* now complained of.⁹³ To show the identity of the two charges, the test is sometimes proposed, whether the same evidence would have supported both indictments. But this is not invariably a safe criterion. The true question is, whether the two acts charged constitute essentially distinct and independent offenses.⁹⁴ Further, it must be remembered that it is not the finding of the jury, but the judgment of the court, that interposes the bar. That is, a verdict of guilty, in a prosecution for an infraction of the liquor laws, upon which no judgment has ever been rendered,—as where exceptions are still pending and undetermined,—is no bar to a subsequent indictment for the same offense.⁹⁵ It is also necessary that the former judgment should have been legally sustainable, or at least, such as could not have been set aside on motion. For example, on an indictment for the sale of liquor on Sunday, defendant offered to show a former trial and acquittal for the same offense. The indictment on the former trial alleged that defendant “on the 11th day of July, 1886, did unlawfully sell,” but did not

⁹³ State v. Ainsworth, 11 Vt. 91.

⁹⁴ State v. Andrews, 27 Mo. 267; State v. Blanut, 48 Ark. 34, 2 S. W. Rep. 190. A conviction for selling liquor without license on a certain day is no bar to a subsequent conviction for selling on another day, although, through the intervention of the plea of guilty, there was no evidence of the exact time of the first sale. State v. Shafer, 20 Kans. 226.

⁹⁵ Comm. v. Fraher, 126 Mass. 265; Comm. v. Lahy, 8 Gray, 459. An order of a justice for a return to defendant of certain liquors seized upon his premises a number of days before an indictment

was found against defendant for keeping a liquor nuisance, is not an adjudication that defendant, at the time the indictment was found, did not keep liquors for illegal sale. State v. Zimmerman, 78 Iowa, 614, 43 N. W. Rep. 458. It is no defense to a prosecution for being a common seller of liquors that a *nol. pros.* was entered as to a previous indictment for the same offense, under an agreement by defendant to discontinue the sale of liquors, although no sales after the entry of the *nol. pros.* are shown. Comm. v. Cutler, 9 Allen, 486.

charge that said 11th day of July was Sunday. It was held that, as the indictment on the former trial did not charge a public offense, the evidence was properly excluded.⁹⁶ With reference to the persons who may take advantage of this plea, the doctrine is that all crimes are several, though committed by two persons acting jointly or in partnership. Hence the conviction of two partners, for selling intoxicating liquor, is a conviction of each.⁹⁷

In prosecutions under the liquor laws, there are many instances in which the same act may constitute either of two distinct offenses, according as it is regarded as a violation of one statute or another. In such case, a former conviction or acquittal is no bar to a subsequent indictment, founded on the same act, but charging it as a violation of a different statutory provision. Thus, a prosecution for selling liquor on Sunday is no bar to a subsequent prosecution for the sale of the same liquor without a license; for the state, in order to convict, must make proof of a different state of facts.⁹⁸ On the same

⁹⁶ *Shepler v. State*, 114 Ind. 194, 16 N. E. Rep. 521.

⁹⁷ *State v. Brown*, 49 Vt. 437.

⁹⁸ *Arrington v. Comm.*, (Va.) 12 S. E. Rep. 224. In this case the learned court remarked: "Whether this ruling was correct or not depends upon whether the offense charged in the former and present prosecution is the same; for as the defense of former conviction or acquittal rests upon the principle that no man shall be twice put in jeopardy for the same offense, the plea, as Blackstone says, must be upon a prosecution for the same identical act and crime. 4 Bl. Comm. 336. And in determining this question of identity, the test is 'not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes, and, if each statute requires proof of an additional act which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment un-

der the other.' *Morey v. Com.*, 108 Mass. 433; *State v. Stewart*, 11 Or. 52, 238, 4 Pac. Rep. 128; *State v. Sonnerkalb*, 2 Nott & McC. 280; *State v. Taylor*, 2 Bailey, 49; *State v. Horneman*, 16 Kans. 452; *State v. Coombs*, 32 Me. 529; *Ruble v. State*, 51 Ark. 170, 10 S. W. Rep. 262; *People v. Carty*, 77 Cal. 213, 19 Pac. Rep. 490; *Whart. Crim. Pl. & Pr.* (9th Ed.) § 471; 1 Chit. Crim. Law, 453. According to some of the authorities, the test is whether the evidence required to support a conviction in one case would be sufficient in the other; or, as Bishop expresses it, the offenses are not the same when each indictment sets out an offense differing in all its elements from that in the other, though both relate to one transaction,—a proposition, he adds, the exact limits of which are difficult to define. 1 Bish. Crim. Law, (7th Ed.) § 1051. Applying this test to the present case, it is clear that the former and present prosecutions are not for the same offense, but that each indictment sets out a separate and distinct offense. The two indict-

principle, a conviction for selling liquor without a license is no bar to an indictment for selling the same liquor to a minor.⁹⁹ So the offense of maintaining a nuisance, by keeping a tenement used for the illegal sale of liquor, is a wholly distinct offense from that of the sale of such liquor, and a conviction for one is no bar to a conviction for the other, although evidence of the same sales of liquor may be relied on to prove each.¹⁰⁰ And the fact that a person has been convicted of keeping a tippling-shop is no bar to an indictment for presuming to be a common seller, although both indictments cover the same period of time, and are supported by the same acts of illegal sale.¹⁰¹ So again, a conviction for presuming to be a common seller of liquors, within a specified period, is no bar to a prosecution for a single act of selling within the same period.¹⁰² And an acquittal on an indictment for maintaining a nuisance, by keeping a tenement for the illegal sale and keeping of liquors, is no bar to an indictment for keeping liquors with intent to sell, although the same evidence is relied on to prove both offenses.¹⁰³

ments are under different statutes; the penalties prescribed are different; and the evidence required to support a conviction in either case is not the same. The first was under section 3804 of the Code, for selling intoxicating liquors on Sunday, and in that case all that was incumbent on the commonwealth to show was a sale on that day. In the present case, the indictment is under the statute first above mentioned, and sets out an offense, an essential element of which is a 'sale of liquor without a license;' the object of one statute being the protection of the morals, peace, and good order of the community by prescribing a penalty for selling liquor on the Sabbath day, the object of the other being the enforcement of the revenue laws by making it a misdemeanor to sell liquor without a license."

⁹⁹ *Ruble v. State*, 51 Ark. 170, 10 S. W. Rep. 262.

¹⁰⁰ *Comm. v. Hogan*, 97 Mass. 122; *Comm. v. Sullivan*, 150 Mass. 315, 23 N. E. Rep. 47; *State v. Lincoln*, 50 Vt. 644.

¹⁰¹ *State v. Inness*, 53 Me. 536. The conviction of a husband for maintaining a liquor nuisance is no bar to the conviction of his wife for being a common seller, although the same testimony is relied on to prove both offenses. *Comm. v. Welch*, 97 Mass. 593.

¹⁰² *State v. Coombs*, 32 Me. 529; *State v. Maher*, 35 Me. 225.

¹⁰³ *Comm. v. McCauley*, 105 Mass. 69; *State v. Jangraw*, 61 Vt. 39, 17 Atl. Rep. 733; *State v. Wheeler*, (Vt.) 20 Atl. Rep. 601. See, also, *State v. Graham*, 73 Iowa, 553, 35 N. W. Rep. 628; *State v. Brown*, 75 Iowa, 768, 39 N. W. Rep. 829.

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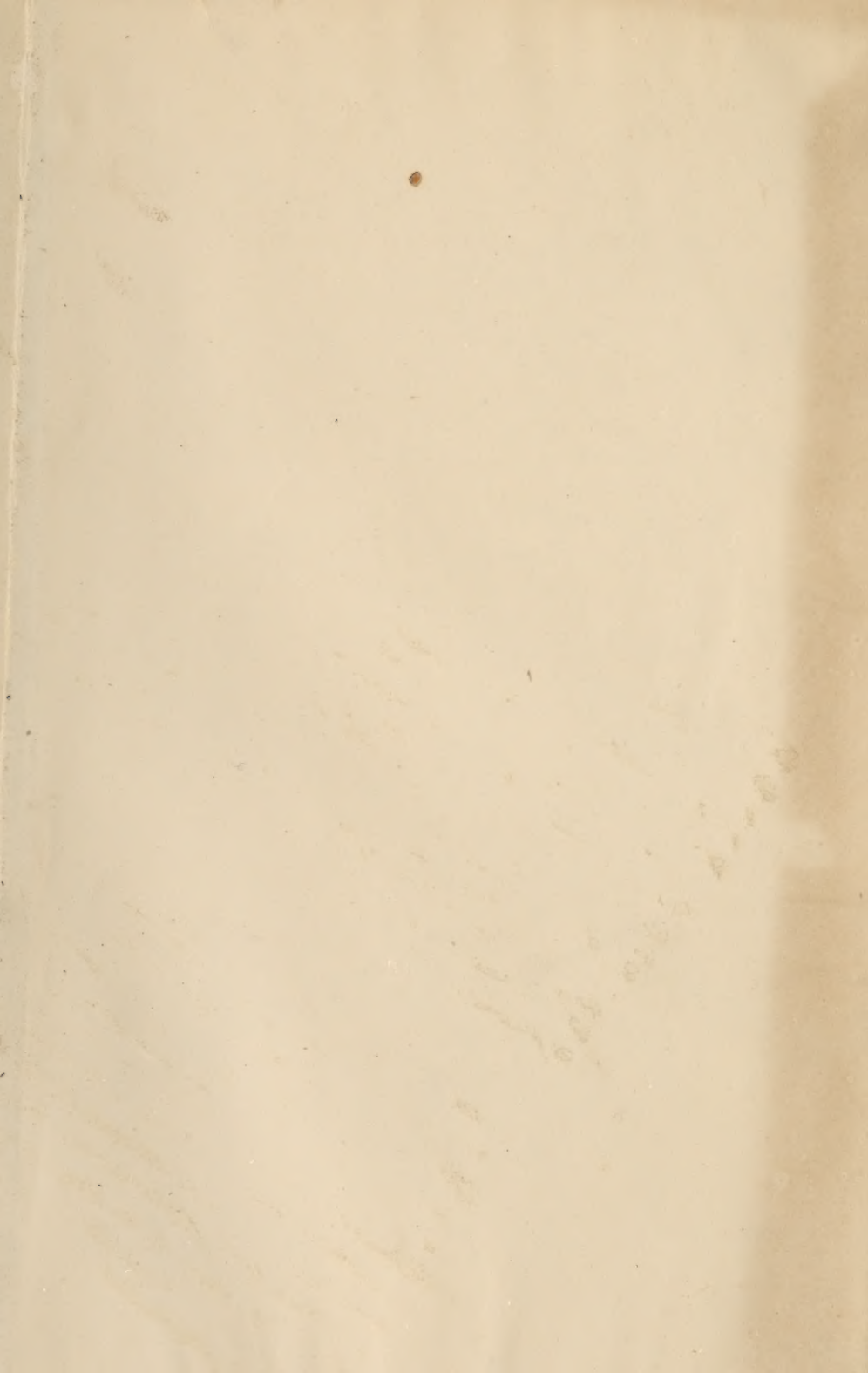
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